

INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES (ICSID)

(ICSID CASE NO. ARB/18/05)

IN THE MATTER OF AN ARBITRATION UNDER  
THE UNITED STATES – COLOMBIA TRADE  
PROMOTION AGREEMENT, SIGNED ON  
NOVEMBER 22, 2006 AND ENTERED  
INTO FORCE ON MAY 15, 2012

ASTRIDA BENITA CARRIZOSA

CLAIMANT,

V.

THE REPUBLIC OF COLOMBIA,

RESPONDENT.

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CLAIMANT'S REPLY  
ON JURISDICTION

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## INTRODUCTION

Respondent's jurisdictional challenge is lethally flawed with respect to all predicates to this Tribunal's exercise of jurisdiction: *ratione temporis*, *ratione voluntatis*, and *ratione materiae*. It shall be demonstrated in considerable detail that Claimant amply has proffered more than just a mere *prima facie* showing.

As shall be detailed in this reply, while Claimant's burden has been met, and far exceeded, for purposes of a jurisdictional consideration, Respondent categorically has failed to meet the burden that technically has shifted to the Republic of Colombia. This showing shall be made plain.

### ***A. Ratione Temporis***

The Tribunal has jurisdiction *ratione temporis* because this matter was timely commenced and concerns a State measure that was taken after the TPA's entry into force. Contrary to Respondent's assertions, Claimant is entitled to the more favorable limitations treatment that Colombia has extended to Swiss investors, which provides a five-year limitations period. Moreover, Respondent's effort to conflate the particular meaning of "dispute" in the Swiss BIT with a broader conception of disagreements is unsupported by the treaty and by public international law generally. Finally, the fact that

Colombia engaged in a series of measures concerning Claimant's investments prior to the treaty's entry into force does not deprive the tribunal of jurisdiction over this dispute concerning the 2014 entry of Order 188/14.

### ***B. Ratione Voluntatis***

The Tribunal has jurisdiction *ratione voluntatis* because Chapter 12 of the TPA creates a class of investors that are provided with fulsome treatment protection standards that are subject to enforcement. Claimant demonstrates that the appropriate interpretation of Art. 12.1.2(b) supplements and does not restrict financial services investors from exercising the robust treatment protection standards set forth in that Chapter.

Moreover, Art. 12.3 (MFN) can be exercised to extend to the Colombia-Switzerland BIT's five-year limitations period in order to create a more favorable treatment of an existing right. Respondent's interpretive analysis of Art. 12.1.2(b) carves out of Chapter 12 (Financial Services) the conceptual content and practical application of Articles 12.2 (National Treatment) and 12.3 (MFN), reducing these and all other substantive provisions in Chapter 12 to the status of rights without remedies, a result that frustrates the workings, purpose and objectives of that Chapter. In addition, Respondent's assertion that importing more favorable conditions by increasing the limitations

period from three to five years constitutes a re-writing of the applicable ISDS provision, is belied by the jurisprudence, basic reason, and common sense. Respondent also errs in conflating BIT analysis with that of a TPA, treating both as indistinguishable instruments. They are not.

The contracting Parties consented to a robust exercise of Art. 12.3 (MFN), which is supported textually, pursuant to the contracting Parties' treaty practice, the existing *travaux préparatoires* (including testimony before the US Congress) unrebutted expert and fact testimony, and the applicable jurisprudence on this subject. Also, even were *all* of Respondent's arguments accepted as governing, which they are not, it is not contested in this case that the contracting Parties consented to arbitrate Art. 10.7 (Expropriation and Compensation), which is explicitly and without quibble incorporated into Art. 12.1.2(b) of the TPA's Financial Services Chapter.

### ***C. Ratione Materiae***

The Tribunal has jurisdiction *ratione materiae* because Claimant made an investment within the meaning of the treaty. Claimant's initial investment in Granahorrar was indisputably an equity investment in a financial institution, and it was only through Respondent's actions that the investment was transformed into different modes at different times.

Respondent's contention that Claimant's supposed failure to comply with local investment registration rules does not deprive the tribunal of jurisdiction, because, inter alia, the TPA contains no provision restricting its coverage to investments made in accordance with the law of the host State.

Moreover, even if such a requirement could be imposed on Claimant notwithstanding the treaty's clear language, the alleged noncompliance does not invoke substantial policy concerns and would not justify depriving the Claimant of the TPA's protection.

#### **D. The Testimony**

Claimant invites the Tribunal to contextualize appropriately the fact and expert testimony that has been proffered. Claimant has submitted a jurisdictional witness statement in addition to documentary evidence and detailed expert reports. Respondent's Counter-Memorial on jurisdiction ("Counter-Memorial") has not challenged many of the core jurisdictional premises on any meaningful bases. Indeed, quite a number of foundational evidentiary propositions have not been at all challenged.

During the course of the reply, the "evidence" that Respondent proffers, remarkably much in the form of improper arguments of counsel, is neither *material* nor probative of the matters presumably

asserted. Indeed, Respondent offers no fact witness whatsoever, and only one expert witness, Dr. Jorge Enrique Ibáñez Najjar.

As will be succinctly established, in part, in this reply, Dr. Ibáñez has failed to disclose extremely important information pursuant to Art. 5(2)(c) of the *IBA Rules on the Taking of Evidence in International Arbitration* establishing beyond cavil that he has had multiple and longstanding professional connections to the Republic of Colombia.

These ties directly and explicitly conflict with the representations made in paragraph 3 of his expert witness testimony in which he asserts that he has “no professional or employment relationship with Colombia”. Perhaps Dr. Ibáñez places greater weight on the present progressive form of the verb “to have”.

Claimant shall ask the Tribunal to strike or simply to accord no weight to his expert opinion, which is also technically flawed.

Claimant also has proffered the expert witness testimony of seven experts.<sup>1</sup> Respondent’s

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<sup>1</sup> Former Magistrate Judge Dr. Martha Teresa Briceño, Dr. Luis Fernando López-Roca, Magistrate Judge Alfonso Vargas Rincón, Professor Jack J. Coe, Jr., Professor Loukas Mistelis, Mr. Olin L. Wethington, and Mr. Antonio L. Argiz, C.P.A.



Answer only addresses the testimony of one of the seven witnesses, Mr. Olin Wethington, the former Assistant Secretary to the United States Department of the Treasury and lead negotiator of the NAFTA's Chapter 14 (Financial Services) on behalf of the United States. In so doing, however, Respondent avoids any merits analysis by characterizing that testimony as mere musings and recollections that should not be at all considered, and that "are not even instructive."

Claimant respectfully invites the Tribunal to assess *all* of the expert witness statements independently, as well as in the context of Respondent's Answer. The Tribunal shall find that it has jurisdiction to conduct a full and thorough merits hearing arising from The Republic of Colombia's abuse of regulatory, legislative, and judicial sovereignty.

## I. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS*

1. Respondent raises a series of arguments directed to the tribunal's jurisdiction *ratione temporis*, virtually all of which are premised upon a recharacterization of Claimant's claims in order to situate them earlier in time. However, it is Claimant's prerogative to formulate their claims as she sees fit. As stated in *ECE Projektmanagement*:<sup>2</sup>

[i]t is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly

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<sup>2</sup> *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, (Award) (September 19, 2013) ("ECE Projektmanagement"), ¶ 4.743. See *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2 (Award) (March 16, 2017) ¶¶ 162-65 (rejecting Respondent's attempt to recharacterize Claimant's case for jurisdictional purposes), CL-0167.

fall to be assessed on the basis on which they are pleaded.<sup>3</sup>

2. Respondent's attempt to recast the Claimant's case is particularly inappropriate at the present stage, where the tribunal is addressing jurisdictional issues. As the tribunal explained in *Infito Gold*:

[a]t the jurisdictional stage, a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant's due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the claimant, at a great procedural cost for that party.<sup>4</sup>

3. Here, Claimant's claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion. Because the relevant State measure occurred while the TPA was in force, and within the five years preceding commencement of the arbitration (a limitations period available to Claimant via the MFN provision of TPA Art. 12.3), the tribunal has jurisdiction *ratione temporis* over Claimant's claims.

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<sup>3</sup> *Infito Gold, Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5 (Decision on Jurisdiction) (December 4, 2017), ¶ 185, RL-0030.

<sup>4</sup> *Id.* ¶ 186.

**A. This Arbitration Was Timely Commenced  
Within the Applicable Limitations Period**

4. The three-year limitations period set forth in Art. 10.18 of the TPA is inapplicable to Claimant's claims in this arbitration. Rather, Claimant is entitled to benefit from the more favorable five-year limitations period contained in the Colombia-Switzerland BIT. Claimant submitted her claims to arbitration on January 24, 2018. Because the claims she is asserting arose after January 24, 2013 (*i.e.*, within the five years prior to submitting the claims to arbitration), Claimant's arbitration demand is timely.

**1. Claimant Is Entitled to the More  
Favorable Limitations Period Provided In  
The Colombia-Switzerland BIT**

5. As explained in Claimant's Memorial on Jurisdiction (dated June 13, 2019) (at ¶¶ 203-266), in the accompanying Expert Report of Olin L. Wethington (dated May 16, 2019) (at ¶¶ 26-35), and in the Jurisdiction *Ratione Voluntatis* section of this Reply (at Part II), the MFN clause in Art. 12.3 of the TPA extends to Claimant the protections of more favorable procedural, as well as substantive, treatment extended by Colombia to investors of other nations. As Claimant has explained, the clause in Art. 12.3 is broadly worded, and it would be both textually and logically insupportable to limit its application solely to substantive protection matters. Indeed, dispute-resolution procedures are

an integral part of the modern investment protection regime, and discrimination with respect to them plainly results in an unequal treatment of investments.

6. Respondent criticizes the lack of an express discussion of TPA Art. 12.3 in connection with Art. 31 of the Vienna Convention on the Law of Treaties (VCLT).<sup>5</sup> Given the extensive discussion of the MFN provision in the Jurisdiction *Ratione Voluntatis* section of Claimant’s Memorial on Jurisdiction,<sup>6</sup> which discusses VCLT Articles 31 and 32 in some depth, Respondent’s comment is puzzling. In any case, the test articulated by VCLT Art. 31 makes it plain that the MFN provision of TPA Art. 12.3 extends to all “treatment”, including treatment with respect to procedural remedies.

7. The central proposition of VCLT Art. 31 is that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Here, each of these elements -- the treaty’s terms, their context, and the treaty’s object and purpose -- all support a reading of the MFN provision that includes procedural remedies in the most-favored nations treatment that was guaranteed to the Claimant.

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<sup>5</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 283.

<sup>6</sup>Memorial on Jurisdiction ¶¶ 203-266.

8. In considering the treaty's terms, the tribunal begins with the language of Art. 12.3(1), which provides that

Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

9. The ordinary meaning of Art. 12.3 plainly supports Claimant's interpretation. The provision guarantees to investors of a Party, and their investments, "treatment no less favorable" than that given by the other Party to any other country's investors and investments. This guarantee is not limited to the application of the substantive protection standards of the TPA, which are provided for in the treaty regardless of any MFN treatment. Nor is the guarantee limited to substantive protection standards at all.

10. The language of Art. 12.3 guarantees most-favored-nation "treatment", in like circumstances, without any other limitation. This is broad language and, as Claimant has shown in

her initial memorial, it has properly been interpreted to include procedural aspects of how investors are treated.<sup>7</sup> As Professor Loukas Mistelis has noted in his expert report (CER-1, ¶ 92), “dispute settlement provisions by their very nature belong to the same category as substantive protections for foreign investors. In other words, the way a right is procedurally exercised is part and parcel of substantive protection.”<sup>8</sup>

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<sup>7</sup> Memorial on Jurisdiction, ¶¶ 203-66.

<sup>8</sup> *See also* Maffezini v. Kingdom of Spain; ICSID Case No. ARB/97/7 (Decision on Jurisdiction) (January 25, 2000) ¶ 54 (“there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors”), CL-30; Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8 (Decision on Jurisdiction) (August 3, 2004), ¶ 102 (access to dispute resolution mechanisms “is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause”), CL-74; Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10 (Decision on Jurisdiction) (June 17, 2005) ¶¶ 29, 31 (investor-State dispute resolution mechanisms “are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment”, and “provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors”), CL-33; Suez, Sociedad General de Aguas de Barcelona S.A. et al. v. Argentine Republic, ICSID Case No. ARB/03/19 (Decision on Jurisdiction) (August 3, 2006) ¶ 59 (“From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters

11. The context in which Art. 12.3 appears within the TPA also confirms that it provides a broad guarantee with respect to “treatment” of investors and investments generally. Three other Articles of the treaty provide investors with comparative protections -- the national treatment provision of Art. 10.3; the most-favored-nation treatment provision of Art. 10.4, and the national treatment provision of Art. 12.2 -- but the guarantees in each of those three provisions are limited to specified (albeit broad) aspects of treatment, in contrast to the general “treatment” guarantee of Art. 12.3.

12. For example, Art. 10.3(1)-(2) (in the investments chapter) provides that:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors *with respect to the establishment, acquisition, expansion, management,*

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governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.”), CL-79; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Decision on Jurisdiction) (October 24, 2011) ¶¶ 66-67 (“the (‘procedural’) right to enforce another (‘substantive’) right is one component of the bundles of rights and duties that make up the legal concept of what property is”, and “the right to enforcement is an essential component of the property rights themselves, ... not a wholly distinct right.”), RL-56.



*conduct, operation, and sale or other disposition of investments* in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

(emphasis supplied).

13. Similarly, Art. 12.2(1)-(2) (in the financial services chapter) provides as follows:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords to its own investors, in like circumstances, *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments in financial institutions in its territory.*

2. Each Party shall accord to financial institutions of another Party and to investments of investors of another

Party in financial institutions treatment no less favorable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.*

(emphasis supplied).

14. Finally, and most significantly, Art. 10.4 -- the most-favored-nation provision of the investments chapter -- provides a similarly circumscribed guarantee of treatment:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like

circumstances, to investments in its territory of investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

(emphasis supplied).

15. These related provisions of the TPA demonstrate that Art. 12.3's guarantee of most-favored-nation treatment is broader in scope than that of the related provisions, as it provides for "treatment" generally and lacks the additional qualifying and limiting language.

16. This structure, in which the most-favored nation treatment guaranteed to financial services investors is broader than the other three types of comparative treatment, is a common feature of U.S. trade agreements since the North American Free Trade Agreement (NAFTA). For example, Art. 1406 of NAFTA provides for MFN "treatment" of financial services investments, whereas Art. 1103 in the general investments chapter extends MFN treatment only "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The U.S. free trade

agreements with Australia,<sup>9</sup> Chile,<sup>10</sup> Korea,<sup>11</sup> Morocco,<sup>12</sup> Oman,<sup>13</sup> Panama,<sup>14</sup> and Singapore,<sup>15</sup> as well as CAFTA-DR,<sup>16</sup> maintain a similar distinction.

17. Respondent makes much of footnote 2 to Art. 10.4 of the TPA, which clarifies that the specific language of that Article is not intended to “encompass dispute resolution mechanisms, such as those in Section B [of Chapter 10], that are provided for in international investment treaties or trade agreements.” However, as Claimant has noted,<sup>17</sup> the parties to the TPA chose *not* to include such a limiting footnote to the MFN clause in Art.

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<sup>9</sup> Articles 11.4, 13.3 (signed May 18, 2004; entered into force Jan. 1, 2005), CL-0327.

<sup>10</sup> Articles 10.3, 12.3 (signed June 6, 2003; entered into force Jan. 1, 2004), CL-0329.

<sup>11</sup> Articles 11.4, 13.3 (signed June 30, 2007; entered into force Mar. 15, 2012), CL-0330.

<sup>12</sup> Articles 10.4, 12.3 (signed June 15, 2004; entered into force Jan. 1, 2006), CL-0331.

<sup>13</sup> Articles 10.4, 12.3 (signed Jan. 19, 2006; entered into force Jan. 1, 2009), CL-0332.

<sup>14</sup> Articles 10.4, 12.3 (signed June 28, 2007; entered into force Oct. 31, 2012), CL-0333.

<sup>15</sup> Articles 15.4, 10.3 (signed May 6, 2003; entered into force Ja. 1, 2004), CL-0335.

<sup>16</sup> Articles 10.4, 12.3 (signed Aug. 5, 2004; entered into force Jan. 1, 2005), CL-0328.

<sup>17</sup> Memorial at ¶ 208.

12.3, which is the clause that is contained in the TPA's financial services chapter and is relevant to this case. The logical consequence of such an omission is that Art. 12.3's MFN provision, unlike that of Art. 10.4, does indeed extend to dispute resolution mechanisms.<sup>18</sup>

18. Nor is there any textual or other basis for incorporating footnote 2 into Chapter 12 of the TPA. Article 12.1(2) provides that elements of Chapter 10 apply to Chapter 12 "only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter." And neither Art. 10.3 nor its accompanying footnote are mentioned among the incorporated provisions. Moreover, Art. 10.2(1) expressly provides that "In the event of any inconsistency between this Chapter and another Chapter, *the other Chapter shall prevail* to the extent of the inconsistency." (emphasis supplied).

19. Not only was footnote 2 to Art. 10.4 never included in nor incorporated into Chapter 12,

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<sup>18</sup> This conclusion is strengthened by the inclusion in Chapter Eleven of the TPA ("Cross-Border Trade in Services") of another footnote confirming that the provisions of that Chapter are not subject to investor-state arbitration under Chapter Ten. Footnote 1 to Article 11.1.3 provides that "[t]he Parties understand that nothing in this Chapter, including this paragraph, is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment)." The Parties to the TPA clearly knew how to expressly provide for the exclusion of dispute-resolution remedies with respect to provisions of the Treaty when they wished to do so.

nor otherwise made applicable to Art. 12.3; an analysis of the text of the relevant provisions confirms that the limitation described in that footnote 2 *simply does not apply* to Art. 12.3. As noted above, Art. 10.4 expressly limits its grant of most-favored-nation protection to certain enumerated categories of treatment, *i.e.*, treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

20. And it is precisely that limiting language that footnote 2 to Art. 10.4 serves to clarify:

2. For greater certainty, *treatment “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”* referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.

(emphasis supplied).

21. Because footnote 2 expressly “clarifies” the limiting language that is present in Art. 10.4, but absent from Art. 12.3, it is plain that the clarification set forth in footnote 2 has no

application to the latter, more broadly drafted, Article.

22. Indeed, had the parties wished to avoid entirely any obligation to extend most-favored-nation treatment with respect to dispute-resolution mechanisms, it would have been simple to agree, in connection with Articles 10.4 and 12.3, that the phrase “treatment”, for purposes of those articles, did not extend to such mechanisms. Equally, the parties could have included a footnote to Art. 12.3 restricting the term “treatment” (as opposed to the language *actually* addressed by footnote 2, which is absent from Art. 12.3). The parties did not elect to do either, and instead chose language that limited only the specifically-drawn language of Art. 10.4 in the general investments chapter.

23. The differences between the most-favored-nation provisions of Articles 10.4 and 12.3, including the application of footnote 2 only to the investments chapter, were not accidental. As mentioned above, United States trade treaties going back to NAFTA provide for differing scopes of MFN protection in their investments and financial services chapters, respectively. Moreover, some seven months prior to the TPA, the United States had employed the identical footnote in an identical manner in its Trade Promotion Agreement with Peru, which was signed on April 12, 2006. Article 10.4 in the general investments chapter of the Peru-US TPA is identical to Art. 10.4 of the

Colombia-US TPA, and both provisions contain an identical footnote 2 limiting the application of the enumerated categories of treatment. Similarly, Art. 12.3 in the financial services chapter of the Peru-US TPA is identical to Art. 12.3 of the Colombia-US TPA (including the absence of a footnote), and extends most-favored-nation treatment generally, rather than only to specific enumerated categories of such treatment.<sup>19</sup>

24. Colombia's treaty practice reflects a similar approach. The 2014 Pacific Alliance Additional Protocol (among Colombia, Chile, Mexico, and Peru), which entered into force on May 1, 2016, contains national-treatment and MFN provisions in its general investments and financial services chapters that are structured identically to those of the Colombia-US and Peru-US TPAs.<sup>20</sup> As

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<sup>19</sup> Likewise, in September 2018, the United States and Korea agreed to amend their Free Trade Agreement to, *inter alia*, add a similar restrictive provision to the MFN provision of the FTA's general Investments chapter, providing that

For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B.

Korea-U.S. Free Trade Agreement, as amended effective January 1, 2019, Art. 11.4, CL-0330. The MFN provision of the FTA's Financial Services chapter, which, like the general Investments chapter, closely parallels the TPA, was not amended to include any such restrictive language. *Id.*, Art. 13.3.

<sup>20</sup> Pacific Alliance Additional Protocol (2014), Articles 10.4, 10.5, 11.3, 11.4, CL-0322.



with the latter two TPAs, the Additional Protocol contains a footnote excluding dispute-resolution mechanisms from the MFN provision in the general investments chapter, but not in the differently-worded MFN provision of the financial services chapter.<sup>21</sup>

25. Colombia's 2008 Free Trade Agreement with Canada, which entered into force on August 15, 2011, provided for the same distinctions. That FTA, like the US-Colombia TPA and multiple other U.S. trade treaties, contains separate chapters for investments generally (excluding financial services investments) and for financial services investments. National treatment provisions in both chapters, and the MFN provision in the general investments chapter, are limited to "treatment ... with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments..." In contrast, the financial services chapter guarantees MFN "treatment" generally.<sup>22</sup> And a restrictive provision present only in the general investments MFN article underscores the difference between that article and the broader financial services MFN provision:

For greater clarity, treatment "with respect to establishment, acquisition,

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<sup>21</sup> *Id.* Articles 10.5 & n. 6, 11.4.

<sup>22</sup> Canada-Colombia Free Trade Agreement (2011) Arts. 803, 804, 1102, 1103, CL-0308.

expansion, management, conduct, operation, and sale or other disposition of investments” referred to in paragraphs 1 and 2 does not encompass dispute resolution mechanisms, such as those in Section B of this Chapter, that are provided for in international treaties or trade agreements.<sup>23</sup>

26. Indeed, Colombia’s 2006 Free Trade Agreement with Chile, which entered into force in 2009, makes it perfectly clear that effect of the additional language restricting MFN treatment “with respect to establishment, acquisition”, etc., is to exclude MFN treatment with respect to dispute resolution -- treatment that would otherwise be applicable, as is the case with Art. 12.3 of the TPA.

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<sup>23</sup> Canada-Colombia Free Trade Agreement (2011) Art. 804(3). *See also* Colombia-Costa Rica Free Trade Agreement (entered into force August 1, 2016), Articles 12.2, 12.3, 14.2, 14.3 (same structure, providing in Art. 12.3(3) of the investments chapter that “Para mayor certeza, el trato con respecto al establecimiento, adquisición, expansión, administración, conducción, operación y venta u otra forma de disposición de inversiones, referido en los párrafos 1 y 2, no comprende los procedimientos de solución de controversias, como el previsto en la Sección B del presente Capítulo, que se establecen en tratados internacionales, incluyendo acuerdos comerciales o de inversión.”), CL-0322-A; Colombia-Panama Free Trade Agreement (signed September 20, 2013; not yet in force), Articles 14.3, 14.4, 16.2, 16.3 (same, with exclusionary language in Art. 14.4(3) of the general investments MFN provision), CL-0311.

Article 9.3 of the Chile-Colombia FTA, which is contained in the “Inversión” chapter, guarantees MFN treatment to investors “en lo referente al establecimiento, adquisición, expansión, administración, conducción, operación y venta u otra forma de disposición de inversiones en su territorio.” Footnote 3 to that Article states that “Las Partes reflejan su acuerdo respecto al Artículo 9.3 en el Anexo 9.3.” And Anexo 9.3 provides that

Las Partes acuerdan que el ámbito de aplicación del Artículo 9.3, *sólo comprende* las materias relacionadas al establecimiento, adquisición, expansión, administración, conducción, operación, venta u otra disposición relativa a la inversión *y, por lo tanto*, no será aplicable a materias procedimentales, incluyendo mecanismos de solución de controversias como el contenido en la Sección B de este Capítulo.

(emphasis supplied).

27. Colombia adopted a similar interpretation of the restrictive language in the 2013 Free Trade Agreement that it signed with Israel (which is not yet in force). Article 10.5, the MFN provision of the Investments Chapter, contains a provision expressly limiting the MFN guarantee so that it does not apply to dispute resolution provisions:

For the sake of avoiding any misunderstanding, it is further clarified that the treatment referred to in paragraphs 1 and 2 shall not apply to definitions, nor to mechanisms for dispute settlement between one Party and an Investor of the other Party, or to any other matter not specifically mentioned in paragraphs 1 and 2.

And paragraphs 1 and 2 of the Article guarantee most-favored-nation treatment to investors and investments, respectively, “with respect to the expansion, management, maintenance, use, enjoyment, conduct or disposal of their investment, operation and sale or other disposition of investments ...”<sup>24</sup>

28. Thus the treaty practice of both the United States and Colombia confirm that (1) the parties expressly exclude dispute resolution from MFN treatment when they desire to do so; (2) in treaties that separately address financial services investments, they consistently afford broader MFN treatment to financial services investments than to investments generally; and (3) when dispute resolution is excluded from MFN treatment, the exclusion applies to the narrower scope of treatment “with respect to establishment, acquisition, expansion, management, conduct,

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<sup>24</sup> Colombia-Israel Free Trade Agreement (2013), Art. 10.5(1)-(3), CL-0316.

operation and sale or other disposition of investments” that is extended to investments generally, as opposed to the broader MFN treatment afforded to financial services investments.

29. Finally, as is discussed in greater detail in the Jurisdiction *Ratione Voluntatis* section of this Reply (at Part II), interpreting “treatment” in Art. 12.3 of the TPA to extend to treatment in connection with dispute-resolution proceedings is most consistent with the TPA’s object and purpose (as well as the language’s ordinary meaning and its proper context).

30. Accordingly, Art. 12.3 of the TPA, which guarantees broad MFN treatment of financial services investments (in contrast to the more limited MFN protection of investments generally), and which does not exclude dispute resolution mechanisms from its grant of MFN treatment (in contrast to Art. 10.4 and footnote 2), permits covered investors to receive the benefit of more favorable dispute-resolution treatment extended by the host State to investors of other States.

31. In particular, by reason of Art. 12.3’s MFN protections, Claimant is not bound by the three-year default time bar that is provided for in Art. 10.18.1 of the TPA. Instead, Claimant is entitled to invoke the more favorable treatment granted by Colombia to Swiss investors under the

Colombia-Switzerland BIT. Article 11(5) of the latter treaty provides a five-year limitations period for arbitration of an investor's claims:

An investor may not submit a dispute for resolution according to this Article if five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.

32. Significantly, application of this five-year limitations period to Claimant's claims does not represent the exercise of Art. 12's MFN clause to import a new right that did not previously exist. Rather, it simply reflects the expansion of an existing dispute-resolution provision (*i.e.*, a time period in which to bring claims) to reflect a more favorable treatment extended by Colombia to Swiss investors.

## **2. Claimant's Claims Accrued After the Limitations Cut-Off Date**

33. The parties are in agreement that this dispute was submitted to arbitration on January 24, 2018.<sup>25</sup> Under the five-year limitations period provided by Art. 11(5) of the Colombia-Switzerland BIT, the arbitration has therefore been timely commenced if "the investor first acquired or should have acquired knowledge of the events giving rise

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<sup>25</sup> Counter-Memorial on Jurisdiction ¶ 275.

to the dispute” after January 24, 2013 (the “cut-off date”).

34. The dispute in this case arose when Respondent engaged in a “measure” violating Claimant’s rights under the TPA, which entered into force on May 15, 2012. The relevant measure, which gave rise to this treaty dispute, was the Constitutional Court’s June 25, 2014 issuance of Order 188/14, which denied the motions for annulment of the Constitutional Court’s May 26, 2011 opinion.<sup>26</sup> This coincided with the end of all judicial labor in Colombia concerning the Claimant’s investment. Because the relevant measure was taken, and therefore the dispute arose, after the January 24, 2013 cut-off date, this arbitration was timely commenced.

35. Respondent contends that the parties’ “dispute”, for purposes of the limitations provision of the Colombia-Switzerland BIT, arose no later than July 28, 2000, when Claimant’s investment companies filed administrative proceedings against the Superintendency and FOGAFIN before the *Tribunal de lo Contencioso Administrativo de Cundinamarca*.<sup>27</sup> However, the term “dispute” in Art. 11(5) cannot be construed so broadly. Rather,

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<sup>26</sup> The May 26, 2011 Opinion was issued before the TPA came into effect on May 15, 2012. As a result, it could not, by itself, give rise to a dispute under the TPA.

<sup>27</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 276.

as used in Art. 11 of the Colombia-Switzerland BIT, the relevant dispute is the controversy (1) between Claimant and Respondent (2) involving Claimant's claims that Respondent has engaged in a measure in violation of the relevant treaty. Such a controversy could not arise until a challenged state measure, alleged to violate the TPA, had occurred.

36. Consistent with Art. 31 of the VCLT, the ordinary meaning of Art. 11(5), considered in context and in light of the BIT's object and purpose, confirms this interpretation. The BIT does not define the term "dispute." However, the first paragraph of Art. 11, which is entitled "Settlement of disputes between a Party and an investor of the other Party", introduces the concept of a dispute that may be referred to the courts or to international arbitration:

*If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.*

(emphasis supplied).

Article 11(2) provides that "[a]ny such matter which has not been settled" within six months may be referred to the courts or arbitration. Thus, absent a contention by an investor that the State



has engaged in *a measure that is inconsistent with the State's obligations under the treaty*, there is no “dispute” to refer to arbitration.<sup>28</sup>

37. Such a contention can only arise -- and therefore there can only be a “dispute” within the meaning of Art. 11 of the BIT -- once the State has engaged in the challenged measure. As the challenged measure is the *sine qua non* of the dispute, a claimant is not aware of the “events giving rise to the dispute” until, at minimum, the challenged measure has occurred.<sup>29</sup>

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<sup>28</sup> Indeed, Art. 11(3) refers to the dispute that may be submitted to arbitration as an “investment dispute”, a term that has been widely recognized absent contrary treaty language as requiring an allegation of a breach of the relevant treaty, leading to loss or damage. *See, e.g., Nissan Motor Co. (Ltd.) v. Republic of India*, PCA Case No. 2017-37 (Decision on Jurisdiction) (April 29, 2019), ¶¶ 208-11 (construing India-Japan Comprehensive Economic Partnership Agreement Art. 96(1)), CL-0191.

<sup>29</sup> *See, e.g., Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, (Interim Award), (October 25, 2016), ¶ 143 (“A putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force. While the date of the entry into force of a treaty may be, and usually is, known some time in advance of the actual entry into force date, a breach of treaty can only arise once the treaty in question has the force of law. ... Before this date, there was no operable [treaty] obligation to breach.”), RL-0024; *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2 (Award) (March

38. Here, the challenged measure occurred on June 25, 2014. That is the date on which the instant dispute arose, and it is undisputed that Claimant brought this arbitration within five years of it.

39. Moreover, the context in which the term “dispute” appears throughout Art. 11 of the BIT also makes it plain that the term refers to controversies (i) between an investor and a State, in which (ii) the investor contends that a State measure has violated the treaty.

40. Addressing the latter requirement first, multiple provisions of Art. 11 refer to “the dispute” as the matter that is submitted to arbitration, and the initial reference in Art. 11 to that dispute is to an “investment dispute.”<sup>30</sup> In that context, and in light of Art. 11(1)-(2), the term

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16, 2017) ¶ 167 (“An investor cannot be obliged or deemed to know of a breach before it occurs.”), CL-0167.

<sup>30</sup> Articles 11(3) (“Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2...”); 11(4) (“Once the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.”); 11(5) (“An investor may not submit a dispute for resolution according to this Article if five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.”); 11(7) (“Neither Party shall pursue through diplomatic channels a dispute submitted to international arbitration...”).

“dispute” necessarily entails a claim that a State measure has violated the treaty, as distinct from domestic court litigation of claims asserted under municipal law.

41. Second, multiple provisions of Art. 11 refer to the “parties to the dispute” as having powers or obligations that only the parties to *the arbitration* -- as opposed to a broader disagreement involving government bodies other than the State -- would have. For example, Art. 11(2)(b) gives the parties to the dispute the ability to agree upon *ad hoc* arbitration distinct from the UNCITRAL rules; Art. 11(6) precludes the State party to the dispute from raising certain defenses in the arbitration; and Art. 11(8) provides that “the arbitral award shall be final and binding for the parties to the dispute...” If the broader conception of “dispute” urged by Respondent were applied in this case, for example, to include the administrative or judicial proceedings preceding this arbitration, then FOGAFIN, the Superintendency of Banking, Claimant’s six investment companies, and even the Council of State (which filed its own motion to vacate Order 188/14) would all be “parties to the dispute” to which the foregoing provisions of Art. 11 would purportedly apply, rendering the language nonsensical.<sup>31</sup>

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<sup>31</sup> Furthermore, the objects and purposes of the Colombia-Swiss BIT -- identified in the BIT’s preamble as being (i) “to intensify economic cooperation to the mutual benefit of both

42. Tribunals have applied a similar construction to the term “dispute” in Fork-in-the-Road clauses, which, like limitations provisions, typically appear in the dispute-resolution portion of a BIT or FTA. Indeed, in the Colombia-Switzerland BIT, the limitations and Fork-in-the-Road provisions appear in the same article of the treaty (Art. 11), and both refer to the identical term, “dispute”, in the context of that Article on investment disputes.

43. In the case of Fork-in-the-Road clauses, Prof. Christoph Schreuer explains that:

Under provisions of this kind, the loss of access to international arbitration applies only if the same dispute was submitted to the domestic courts. Investors are often drawn into legal disputes of one sort or another in the course of their investment activities. These disputes may relate in some way to the investment, but they are not necessarily identical to the dispute

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States,” (ii) “to create and maintain favourable conditions for investments by investors of one Party in the territory of the other Party”, and (iii) “to promote and protect foreign investments with the aim to foster the economic prosperity of both States” -- would be frustrated, rather than furthered, by a construction of “dispute” in Art. 11 that served to deny investors a remedy where the investor has been prejudiced by a series of adverse, related government actions occurring over a substantial period of time.

covered by the BIT's provisions on consent to arbitration.

In order to determine whether the choice under a fork in the road clause has been made, it is necessary to establish if the parties and the causes of action in the two sets of lawsuits are identical. The loss of access to international arbitration applies only if the same dispute between the same parties has previously been submitted to the domestic courts. This principle is now well established and has been confirmed in a number of decisions.

...

[T]ribunals have held consistently that a fork in the road clause will prevent access to international arbitration only if the same dispute involving the same parties and causes of action had been submitted to the courts of the host State. The jurisdiction of an ICSID tribunal is not affected by the submission of a related

but not identical dispute to domestic courts.<sup>32</sup>

44. Limitations provisions (such as Art. 11(5) of the Colombia-Switzerland BIT) and Fork-in-the-Road provisions (such as Art. 11(4)) reflect similar policies. In both cases, an investor that has had an ample opportunity to resolve its investment dispute, *i.e.*, its claims that the State has violated the relevant treaty, need not be given a further opportunity to pursue those claims. The policy does not apply when an investor could not have raised its treaty claims outside of the arbitration, either because they had not yet accrued or because they were outside the scope of past litigation. The similar construction given to “dispute” in these two, related contexts confirms and effectuates the policy alignment of these two types of provisions.

45. In contrast, the cases cited by Respondent such as *Lucchetti v. Peru*<sup>33</sup> address the term “dispute” in a very different context: that of the treaty’s overall applicability. In *Lucchetti*, for example, the tribunal considered the meaning of the term within a provision defining the overall scope of application of the Chile-Peru BIT:

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<sup>32</sup> C. Schreuer et al., *THE ICSID CONVENTION -- A COMMENTARY* (2d ed. 2009), Art. 26, ¶¶ 57-58, 72 (collecting cases), CL-0337.

<sup>33</sup> *Empresas Lucchetti, S.A., et al. v. Republic of Peru*, ICSID Case No. ARB/03/4 (Award) (February 7, 2005), RL-0020.

## Article 2

### SCOPE

This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force.<sup>34</sup>

46. Provisions such as these address the scope and applicability of the treaty, including its substantive protection standards, rather than the procedures for presenting a claim that is covered by the treaty. Given that their context and function are different from that of dispute-resolution provisions, tribunals' interpretation of the word "dispute" in this other context is not highly probative of its meaning in Art. 11 of the Colombia-Switzerland BIT.

47. In any event, as is explained in Part B.2.b below, *Lucchetti's* broad-brush delineation of a dispute in terms of its "real cause"<sup>35</sup> is incorrect

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<sup>34</sup> Chile-Peru BIT, Art. 2, *quoted in Lucchetti v. Peru*, ¶ 25, RL-0020.

<sup>35</sup> *Lucchetti*, ¶ 50, RL-0020.

even in its proper context of entry-into-force provisions.

48. Accordingly, because the key event giving rise to the dispute arose after the TPA's entry into force -- and therefore after the limitations cut-off date -- this arbitration was timely commenced and the tribunal has jurisdiction *ratione temporis*.

**3. The Existence of Prior Relevant State  
Actions Does Not  
Deprive the Tribunal of Jurisdiction  
*Ratione Temporis***

49. Respondent seeks to place the parties' dispute earlier in time because a series of (mostly adverse) State actions with respect to Claimant's investment took place before the challenged measure. However, the existence of factual predicates of Claimant's claims, pre-dating the challenged State measure and falling outside the scope of the applicable limitations period, does not render Claimant's claims untimely. As numerous tribunals have found in a wide range of circumstances, these background facts do not serve to accelerate the accrual of Claimant's claims for limitations purposes.

50. For example, in *Glamis Gold, Ltd. v. United States*, UNCITRAL (Award) (June 8, 2009), CL-0173, the tribunal explained that timely claims may incorporate additional facts falling outside the



limitation period as “background facts” or “factual predicates.”<sup>36</sup> Thus, in that case, where the Claimant’s claim was premised upon governmental measures that allegedly rendered its gold-mining rights worthless, the tribunal found that administrative determinations and recommendations made outside the limitations period, which served as the basis for a subsequent denial of the Claimant’s proposed mining plan, did not trigger the NAFTA limitations provision. The tribunal explained that “[i]t is necessary that any action be preceded by other steps, but such factual predicates are not *per se* the legal basis for the claim.” Because the Claimant’s claim was based upon a measure taken within the limitations period, it was not time-barred, even though some of the predicate actions had taken place previously.<sup>37</sup>

51. The tribunal in *Eli Lilly & Co. v. Canada*<sup>38</sup> applied a similar analysis. It found that it had jurisdiction *ratione temporis* over claims based upon judicial invalidation of two of the Claimant’s pharmaceutical patents, even though those invalidations were based upon the application of a “promise utility” doctrine, developed by the Canadian courts prior to the relevant limitations period, which the Claimants

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<sup>36</sup> *Glamis Gold*, ¶ 348, CL-0173.

<sup>37</sup> *Id.* ¶¶ 348-50.

<sup>38</sup> ICSID Case No. UNCT/14/2 (Award) (March 16, 2017), CL-0167.

argued constituted a radical change in Canadian law. Recognizing that jurisdiction must be assessed with respect to claims as asserted by the Claimant (rather than as characterized by the Respondent), the tribunal found that the Claimant was challenging specific judicial measures relating to the invalidation of the two patents, and not challenging the disputed doctrine in the abstract or in the context of its application to invalidate another of the Claimant's patents prior to the limitations period.<sup>39</sup>

52. With respect to events that occurred before the limitations period began, the *Eli Lilly* tribunal agreed with the “well accepted approach” of permitting a claimant to reference “factual predicates’ occurring outside the limitation period, even though they are not necessarily the legal basis for its claim.” As the tribunal pointedly noted, the NAFTA time-bar provisions “in no way limit or preclude such consideration.”<sup>40</sup>

53. Significantly, the *Eli Lilly* tribunal found that the relevant dates for triggering the start of the limitations period were the dates on which the Canadian Supreme Court had denied leave to further appeal the judicial invalidations of the two patents in question.<sup>41</sup> Only then was

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<sup>39</sup> *Id.* ¶¶ 163-65.

<sup>40</sup> *Id.* ¶¶ 172-73.

<sup>41</sup> *Id.* ¶ 170.

judicial labor brought to an end in connection with the contested legal proceedings.

54. The *Eli Lilly* tribunal also cited *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2 (Award) (October 11, 2002) in support of its reasoning. In *Mondev*, as in the present case, a pattern of governmental harm to the investment, including associated domestic court litigation, began well outside the relevant limitations period (and before the treaty had come into force), but the last decisions of the domestic courts were rendered within that period. The tribunal found that it had jurisdiction *ratione temporis* over those claims that challenged the court decisions, as the arbitration had been commenced “within three years of the final court decisions.”<sup>42</sup>

55. Moreover, particularly where the challenged State measure is a court decision, measuring the limitations period from the last act of judicial labor is a logical consequence of the requirement that a claimant exhaust feasible judicial remedies in order to assert a claim for denial of justice or judicial expropriation. States normally insist upon such exhaustion, and for understandable reasons. As the tribunal explained

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<sup>42</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award) (October 11, 2002), ¶ 87 CL-0045.

in *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award) (April 8, 2013), RL-0045,

[T]he responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so.

As long as such decisions are not final and binding and can be corrected by the internal mechanisms of appeal, they do not deny justice. In other words, as long as the judicial system is not tested as a whole, the fair and equitable treatment standard is not violated via denial of justice. The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through the final product of its

administration of justice which the investor cannot escape.<sup>43</sup>

56. While, in theory, investors are not required to pursue remedies that are not “reasonably available” under the circumstances, the burden of proof is typically placed on the investor to establish that it exhausted all available remedies.<sup>44</sup> In *Loewen Group*, for example, the arbitral tribunal found that the Claimant had failed to meet its burden of proof as to why it had not pursued a petition for a writ of *certiorari* to the U.S. Supreme Court,<sup>45</sup> even though that court

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<sup>43</sup> *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Award) (April 8, 2013) ¶¶ 442-43. RL-0045. *See, e.g.*, *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Award) (November 6, 2008) ¶ 255, CL-0177, and (Decision on Jurisdiction) (June 16, 2006) ¶ 121, CL-0038; *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award) (June 26, 2003) ¶¶ 149-56 (explaining that “[t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision” and noting that “[t]he requirement has application to” national treatment, minimum standard of treatment, and expropriation claims in that case), CL-0183.

<sup>44</sup> *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Award) (June 26, 2003) ¶¶ 209-17, CL-0183.

<sup>45</sup> *Id.* ¶¶ 210-17.

agrees to consider only approximately 1% of such cases<sup>46</sup> (and the percentage of cases actually reversed is even smaller).<sup>47</sup>

57. Consequently, in this case, it was only at the point that the Constitutional Court refused to correct its erroneous decision that the present dispute became ripe. Claimant had no reason to believe that the petition to vacate the Constitutional Court's initial ruling would be futile or pointless. Indeed, the Council of State itself believed that the initial Constitutional Court ruling was sufficiently shocking, and the prospects of addressing it sufficiently reasonable, that it filed its own petition to vacate the ruling.<sup>48</sup> A successful application would have meant that the Constitutional Court's erroneous ruling was vacated and Claimant's rights under the November 1, 2007 Council of State decision were fully restored.

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<sup>46</sup> *E.g.*, Harvard Law Review, *The Supreme Court 2017 Term - The Statistics*, 132 Harv.L.Rev. 447, 455 tbl II(B) (2018) , CL0347; Harvard Law Review, *The Supreme Court 2016 Term - The Statistics*, 131 Harv.L.Rev. 403, 410 tbl II(B) (2017) , CL-0346.

<sup>47</sup> *E.g.*, Harvard Law Review, *The Supreme Court 2017 Term - The Statistics*, 132 Harv.L.Rev. 447, 455 tbl II(D) (2018) , CL-0347; Harvard Law Review, *The Supreme Court 2016 Term - The Statistics*, 131 Harv.L.Rev. 403, 456 tbl II(D) (2017) , CL-0346.

<sup>48</sup> Exhibits C-25, C-29.

58. Respondent, however, argues that it has identified a supposed two-part test to be applied when State measures “straddle” a treaty’s entry into force or a limitations cut-off date. Claiming that the test was adopted by *Spence v. Costa Rica*, Respondent argues that Claimant must show that the challenged measure “fundamentally changed the status quo of the claimant’s investment” and that measure is “independently actionable”, and can be “evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct.”<sup>49</sup>

59. This “test”, however, is Respondent’s own invention. *Spence* says *nothing* about fundamental changes to the status quo of the investment, and its reference to the challenged measure being independently actionable is simply a reference to the intertemporal principle codified in Art. 10.1.3 of CAFTA-DR.<sup>50</sup> Respondent proceeds to cite a mishmash of awards variously addressing either entry-into-force or limitations period issues in an effort to justify its proposed test, which is supported neither by the jurisprudence nor by the language of the relevant treaty.

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<sup>49</sup> Respondent’s Counter-Memorial on Jurisdiction at ¶ 172, citing *Spence* ¶ 237(b) (RL-0024).

<sup>50</sup> *Spence*, ¶ 237(b) (RL-0024).

**a. No “Fundamental Changes to  
*Status Quo*” Requirement**

60. Respondent relies upon three cases in support of its proposed “status quo” test: *Corona Materials, LLC v. Dominican Republic*,<sup>51</sup> *Eurogas, Inc. et al. v. Slovak Republic*,<sup>52</sup> and *ST-AD v. Bulgaria*.<sup>53</sup>

61. *Corona* concerned an application for an environmental license to operate a construction aggregates project in the Dominican Republic. The Claimant’s application was denied *before* the limitations cut-off date. Also *before* the cut-off date, the Claimant sent a letter to the Respondent’s environmental ministry requesting that the ministry reconsider its denial of the application. The ministry never responded to the Claimant’s request for reconsideration (a non-response which continued *after* the limitations cut-off date). The issue for the tribunal was whether the Claimant had complied with the three-year limitations period under CAFTA-DR, which was triggered by the

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<sup>51</sup> ICSID Case No. ARB(AF)/14/3 (Award) (May 31, 2016), RL-0012.

<sup>52</sup> ICSID Case No. ARB/14/14 (Award) (August 18, 2017), RL-0013.

<sup>53</sup> PCA Case No. 2011-06, UNCITRAL Arbitration Rules (Jurisdiction) (July 18, 2013), RL-0011.



Claimant's actual or constructive knowledge of the treaty breach and of resulting harm.<sup>54</sup>

62. After determining the relevant limitations cut-off date, the arbitral tribunal addressed the question of when the Claimant had first acquired the requisite knowledge. The Claimant argued that the environmental ministry's continued failure to respond to the reconsideration request amounted to a denial of justice that occurred at some point after the limitations cut-off date.<sup>55</sup> In addition to rejecting Claimant's denial of justice claim for failure to pursue any judicial or further administrative recourse against the environmental ministry's initial decision,<sup>56</sup> the

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<sup>54</sup> ICSID Case No. ARB(AF)/14/3 (Award) (May 31, 2016), ¶¶ 43, 45, 192-93, RL-0012.

<sup>55</sup> *Id.* ¶¶ 201, 204-05.

<sup>56</sup> The tribunal rejected the denial-of-justice theory as insufficient because the claimant had not invoked any judicial or other adjudicatory remedies against the license denial:

Having regard to the clear position at international law, as pleaded, the Claimant's case on denial of justice must fail because it can point to no act or any administrative adjudicatory proceeding before any court or administrative adjudicatory body in the Dominican Republic beyond the unanswered Motion for Reconsideration which, as noted above, did not itself amount to an administrative adjudicatory proceeding. In this context, a mere failure to answer the Motion cannot by any objective measure be equated to a denial of justice at international law. ...

tribunal also rejected the Claimant's theory as untimely because the State had not taken any action after the cut-off date that would give rise to a new claim. As the tribunal explained, "the absence of a response to the Motion for Reconsideration cannot be considered as a stand-alone 'measure', or a separate breach of the Treaty."<sup>57</sup> Moreover, "[t]he DR's failure to respond to the Claimant's Motion for Reconsideration was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision. Under the circumstances, the State's inaction following the Claimant's efforts to have that very same measure reconsidered cannot be considered a separate

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[A] finding of denial of justice under international law necessarily depends on the final product of the State's domestic legal system. Since, as the United States put it, the "responsibility [of a State] is engaged as the result of a definitive judicial decision by a court of last resort", there can be no denial of justice without a final decision of a State's highest judicial authority. In the instant case, not only is there no final decision of a State's highest judicial authority, there is no decision of an administrative adjudicatory body or judicial authority at all. In the end, faced with no official response to its Motion, the Claimant failed to take any step in proceedings for administrative or judicial review.

*Id.* ¶¶ 262, 264 (emphasis in original).

<sup>57</sup> *Id.* ¶ 210.

breach of the Treaty.”<sup>58</sup> Rather, if there was a treaty breach, it began prior to the limitations cut-off date and was not restarted when the State did nothing further.

63. Significantly, the tribunal concluded, the evidence, and particularly a letter sent by the Claimant nearly four months prior to the cut-off date:

[c]onstitutes clear evidence of the fact that, on that date at the latest, the rejection of the application for an environmental license and the failure to address the Motion for Reconsideration (among other alleged acts and omissions by the Dominican Republic) was considered by the Claimant to amount to a violation by the DR of several provisions of DR-CAFTA Chapter 10, and that such alleged breaches caused loss or damage that the Claimant quantified in specific terms.<sup>59</sup>

64. Thus, *Corona* did not turn upon whether a State measure following the treaty’s entry into force “fundamentally changed the status quo of the Claimant’s investment”, but rather upon whether administrative inaction by the State,

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<sup>58</sup> *Id.* ¶ 212.

<sup>59</sup> *Id.* ¶ 236; *see* ¶¶ 225, 227.

following accrual of a claim outside of the limitations period, gave rise to a new claim within the limitations period. Understandably -- but with no relevance to the instant case -- the *Corona* tribunal concluded that the answer was “no.”

65. *Eurogas* involved, not a limitations issue, but rather a scope-of-application provision in the Canada-Slovakia BIT, which is a successor treaty that replaced and terminated a predecessor BIT involving the Czech and Slovak Federal Republic. The provision in question, Art. XV(6) of the Canada-Slovakia BIT, delineated between the application of the new treaty and that of its predecessor BIT.<sup>60</sup>

66. That provision, which was part of Art. XV, “Final Provisions and Entry into Force”, provided as follows:

Each Contracting Party shall notify the other in writing of the completion of the procedures required in its territory for the entry into force of this Agreement. This Agreement shall enter into force three months after the latter of the two notifications. Upon the entry into force of this Agreement, the *Agreement between the Government of Canada and the*

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<sup>60</sup> ICSID Case No. ARB/14/14 (Award) (August 18, 2017), ¶ 284, RL-0013.

*Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments*, done at Prague on 15 of November 1990, **shall be terminated except that its provisions shall continue to apply to any dispute** between either Contracting Party and an investor of the other Contracting Party **that has been submitted to arbitration pursuant to that Agreement by the investor prior to the date that this Agreement enters into force. Apart from any such dispute, this Agreement shall apply to any dispute which has arisen not more than three years prior to its entry into force.**<sup>61</sup>

67. As Art. XV(6) reflects, the Canada-Slovakia BIT involved relatively unusual circumstances, where (1) a pre-existing treaty had provided for arbitration of investor-state disputes up until the new treaty came into effect, and (2) the new treaty provided for arbitration of investor-state controversies that had arisen during the three years prior to its entry into force. The treaty therefore used the term “dispute” in a context very different from that of the Colombia-Switzerland BIT.

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<sup>61</sup> *Agreement Between Canada and The Slovak Republic for the Promotion and Protection of Investments* (entered into force March 14, 2012) (bold emphasis supplied), CL-0296.

68. As a result, the *Eurogas* tribunal found that:

[a] provision such as Article 15(6) of the Canada-Slovakia BIT obviously aims at avoiding that disputes which have accumulated for more than a certain number of years (three years in the case of the Canada-Slovakia BIT) give rise at the same time to a multitude of treaty claims brought before arbitral tribunals. A pre-existing “dispute”, *in that context*, is any dispute whose intrinsic elements are invoked by the investor as the basis of the treaty claim.<sup>62</sup>

69. In that context, the *Eurogas* tribunal found that the parties’ dispute had arisen more than three years prior to the BIT’s entry into force and therefore was not covered by the BIT. Two points were critical to the tribunal’s analysis.

70. First, the tribunal found that, under the facts of that case, “it would be artificial to distinguish the dispute between [the operating company] and the State authorities concerning [the company’s] own mining rights, from the dispute between [its] shareholders and the State in respect of [its] mining rights.” Indeed, long before the

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<sup>62</sup> *Eurogas*, ICSID Case No. ARB/14/4 (Award) (August 18, 2017), ¶ 441 (emphasis supplied), RL-0013.

three-year entry-into-force window provided under Art. XV(6), the investor's President and CEO, who was also the executive director of the operating company, wrote a letter to the Minister of Economy *on behalf of both entities*, protesting the State's actions *and threatening investor-state arbitration*.<sup>63</sup>

71. Second, the *Eurogas* tribunal found that there was “no new State conduct [giving] rise to a new dispute after [the cut-off date] (or even (re)crystalliz[ing] an old dispute)...” The post-entry-into-force conduct of which the investor complained was “several decisions of the mining authorities (not the judicial authorities) refus[ing] to reconstitute the rights” that had been taken years before. Rather than giving rise to an additional “dispute” within the meaning of Art. XV(6), these decisions of the mining authorities simply constituted “a refusal to resolve the ongoing dispute, which arose from the alleged breach [at the time of the taking].”<sup>64</sup>

72. Neither of these factors, of course, is present in the instant case. Thus, even if the *Eurogas* analysis were not properly limited to the unusual context in which Art. XV(6) uses the term “dispute”, its analysis would not apply to the instant case, where (1) the claims and parties in

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<sup>63</sup> *Id.* ¶¶ 446-48.

<sup>64</sup> *Id.* ¶¶ 454-58.

the underlying litigation were fully distinct from the present investor-state arbitration and (2) the Constitutional Court's 2014 Order constituted a new State measure on which Claimant's claims are based.<sup>65</sup>

73. The third case cited by Respondent, *ST-AD v. Bulgaria*,<sup>66</sup> dealt with neither a limitations provision nor an entry-into-force provision but rather with a claimant seeking to raise claims that existed before the Claimant became an investor under the BIT. The controversy concerned an alleged expropriation of real property that occurred in the 1990s and was eventually confirmed by a Supreme Cassation Court decision in 2000. The then-owner of the company claiming an expropriation sought to set aside the Supreme Cassation Court's decision on February 6, 2006, and the court rejected that application on May 22, 2006. Three days later, the Claimant became an investor in the company.<sup>67</sup>

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<sup>65</sup> Furthermore, the *Eurogas* award was accompanied by a strong dissenting opinion. In his dissent, Professor Emmanuel Gaillard disagreed with the majority on the purpose of Article XV(6), the construction of the term "dispute" and the application of Article XV(6) to the facts of the case. *Eurogas*, dissenting opinion of Prof. Emmanuel Gaillard, July 26, 2017, ¶¶ 9, 12-14, 26-27, CL-0170.

<sup>66</sup> *ST-AD GmbH v. Republic of Bulgaria*, Permanent Court of Arbitration, UNCITRAL Arbitration Rules (Jurisdiction) (July 18, 2013), RL-0011.

<sup>67</sup> *Id.* ¶¶ 98-102, 112-15, 123-24.



74. Seeking to create a State measure that would post-date its investment, the Claimant thereafter caused the company to file a second application to set aside the Supreme Cassation Court's 2000 decision in 2010, which was rejected as being precluded by the May 22, 2006 decision refusing the first set-aside application.<sup>68</sup> This second application "essentially restated the same arguments as those presented in support of its first application to set aside."<sup>69</sup>

75. While acknowledging that events occurring before the Claimant became a protected investor under the BIT may be relevant to the background, the causes, or the scope of violations of the BIT, the *ST-AD* tribunal emphasized that "some event occurring after the Claimant has become a protected investor must exist" in order to invoke the tribunal's jurisdiction.<sup>70</sup> The tribunal noted that the Supreme Cassation Court's rejection of the second set-aside application was "the only possible relevant event that happened after the critical date of May 22, 2006, when the Claimant became a protected investor under the BIT."<sup>71</sup> Under the circumstances, the tribunal found that this decision was insufficient to give rise to a dispute.

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<sup>68</sup> *Id.* ¶¶ 128, 316.

<sup>69</sup> *Id.* ¶ 326.

<sup>70</sup> *Id.* ¶ 308-310.

<sup>71</sup> *Id.* ¶ 316.

76. The key consideration for the tribunal was that:

[a] tactic based on the resubmission of an application that has been denied before a claimant becomes an investor after it has acquired such status is unacceptable. It creates an illusion of an event that happened when a protected investor was on the scene. But like all illusions, it is a misleading illusion.<sup>72</sup>

77. After extensively analyzing the grounds of the two applications to set aside the Supreme Cassation Court's decision and the rulings thereon, the *ST-AD* tribunal concluded that:

[n]othing new of any relevance was presented by [the company] in its second application to set aside Decision 1153 [the Supreme Cassation Court's 2000 decision], when it had a [new,] German shareholder. Rather, this application can be considered, as aptly described by the Respondent, as a "repackaging" of the first application to set aside that same Decision 1153, rendered six years before the Claimant became an investor in Bulgaria.

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<sup>72</sup> *Id.* ¶ 317.

The Tribunal reiterates that it is not acceptable for a claimant to artificially create a new act of the State allegedly interfering with its rights by simply “mirroring” events that occurred before it became a protected investor. For example, if a claimant, before coming under the protection of a given BIT, had asked for and been refused a license, it could not simply purport to create an event posterior to it becoming a protected investor by simply presenting the very same request for a license that would, no doubt, be similarly refused. In the present case, the Claimant cannot establish jurisdiction for this Tribunal by presenting a request to set aside Decision 1153 after it became an investor on similar grounds than the request that was denied prior to its becoming a protected investor.<sup>73</sup>

78. Consequently, the tribunal found that the *ST-AD* Claimant had not shown a new violation by the State after it became a protected investor, and that jurisdiction *ratione temporis* was therefore lacking. The tribunal also denied jurisdiction on various other grounds, including that the Claimant’s attempt to manufacture

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<sup>73</sup> *Id.* ¶¶ 331-32.

jurisdiction under the BIT by introducing a German investor after all domestic legal options had failed constituted an abuse of the process.<sup>74</sup>

79. Thus, like the other cases cited by Respondent, *ST-AD* does not turn upon whether the challenged State measure worked “fundamental changes” to the “status quo”, but rather upon the absence of any meaningful State measure during the relevant time period. Nor does a superficial analogy to one of the facts of the instant case -- the issuance of an adverse judicial decision after the relevant cut-off date -- withstand even cursory scrutiny. In *ST-AD*, the second application to set aside Decision 1153 was made three days after the Claimant became an investor and simply repackaged an earlier set-aside motion that had been denied prior to the investment. In the instant case, as is discussed in point 4 below, (i) the motion for annulment was the first such motion and was made promptly after a shocking ruling of the Constitutional Court (a ruling that, as described in Claimant’s initial submissions, set off a constitutional crisis in the country), (ii) the motion was a procedurally and substantively legitimate invocation of the Court’s responsibility to vacate its 2011 decision, and (iii) the motion was not brought after the fact in an attempt to manufacture jurisdiction under the TPA but was

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<sup>74</sup> *Id.* ¶¶ 421-23.

already pending at the time the TPA entered into force.

80. In short, there is no textual or other basis for the “fundamental change to status quo of investment” requirement urged by Respondent. Rather, when State actions straddle a relevant cut-off date, what is required is “conduct of the State after that date which is itself a breach.”<sup>75</sup> The Constitutional Court’s Order 188/14 is precisely such conduct in this case.

#### **b. Meaning of the “Independently Actionable” Requirement**

81. Respondent relies heavily upon *Spence v. Costa Rica* as the source of a supposed requirement that State measures within the relevant time period be “independently actionable’, such that the ‘alleged breach [can] be evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct[.]’”<sup>76</sup> However, Respondent’s expansive interpretation of *Spence* is unwarranted. Read carefully, *Spence* simply supports the uncontroversial proposition that the challenged State measure during the relevant timeframe (post-entry-into-force and after the limitations cut-off date) must give rise to a claim

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<sup>75</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award) (October 11, 2002), ¶ 70, CL-45.

<sup>76</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 172 (bracketed language in original).

under the treaty; *i.e.*, the measure must be a violation of the host State's obligations and result in loss or damage to the investor.<sup>77</sup>

82. As an initial matter, the *Spence* tribunal itself warned about the use of its award as precedent in light of the convoluted nature of the underlying fact pattern:

The jurisdictional aspects of this case are heavily fact-specific. Although interpretations of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact. *The Tribunal thus cautions any reading of this Award that would give it wider "precedential" effects.*<sup>78</sup>

83. *Spence* addressed two different types of timing-related issues: a limitations issue under Art. 10.18.1 of CAFTA and an intertemporal principle issue under Art. 10.1.3. With respect to the former, the tribunal reasoned that "if a claim is to be justiciable for purposes of CAFTA Art. 10.18.1, ... it must rest on a breach that gives rise

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<sup>77</sup> See *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 (Interim Award) (October 25, 2016), ¶ 210 (RL-0024) (*citing* *Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award) (October 11, 2002), ¶ 70, CL-0045).

<sup>78</sup> *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2 (Interim Award) (October 25, 2016), ¶ 166 (emphasis supplied), RL-0024.

to a self-standing cause of action in respect of which the Claimant first acquired knowledge within the limitation period.” What is required is that the challenged State measure within the limitations period constitute “a cause of action, a claim, in its own right.”<sup>79</sup> In this regard, the *Spence* tribunal specifically considered “whether a court judgment can of itself constitute a breach of the CAFTA and amount to a self-standing cause of action, including for entry into force and limitation period purposes.” The tribunal found that a court judgment can indeed be “an independently actionable breach, a distinct and legally significant event that is capable of founding a claim in its own right...”<sup>80</sup>

84. The less precise language of the *Spence* decision arises in the context of the second type of issue, which involved the intertemporal principle contained in CAFTA’s Art. 10.1.3.<sup>81</sup> The tribunal noted that State conduct occurring before the treaty entered into force would not be subject to any obligations under the treaty. As a result, such

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<sup>79</sup> *Id.* ¶ 210 (citing *Mondev* ¶ 70). Significantly, the tribunal also acknowledged that “[a] putative claimant cannot acquire knowledge of an alleged breach of a treaty until that treaty enters into force”, because “a breach of treaty can only arise once the treaty in question has the force of law.” *Id.* ¶ 220.

<sup>80</sup> *Id.* ¶ 276.

<sup>81</sup> Article 10.1.3 provides (similar to Article 10.1.3 of the TPA): “For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”

conduct could not be relied upon to establish a treaty breach, even in connection with post-entry-into-force conduct, if the latter would not itself constitute a breach of the treaty.<sup>82</sup> A claim is therefore not “independently justiciable” under the treaty if it is based upon “a finding going to the lawfulness of conduct *judged against treaty commitments that were not in force at the time.*”<sup>83</sup>

85. As an application of this principle, the *Spence* tribunal cited the conclusion in *Mondev* that “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”<sup>84</sup>

86. The facts of the instant case do not involve the problems contemplated by *Spence*. The challenged State measure, which took place after the TPA’s entry into force and after the limitations cut-off date, is the Constitutional Court’s issuance of Order 188/14. That order, which was an affirmative act of the State that served to extinguish Claimant’s rights relating to the investment, directly violated Respondent’s obligations to Claimant under the TPA. To adjudicate Claimant’s claims under the TPA, there is no need to apply the treaty’s provisions

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<sup>82</sup> *Spence* ¶ 217 (RL-0024).

<sup>83</sup> *Id.* ¶ 222 (emphasis supplied).

<sup>84</sup> *Id.* (citing *Mondev* ¶ 70).



retrospectively to Colombia's acts that preceded its entry into force, which acts were subject to Colombian law (and to customary international law concerning the treatment of aliens).

87. Thus, *Spence* provides no basis for declining jurisdiction *ratione temporis* over the Claimant's claims.

**4. Respondent Mischaracterizes the Petition for Annulment, Which Was a Procedurally and Substantively Appropriate Request Directed to the Constitutional Court's 2011 Decision**

88. In an effort to present Order 188/14 as a legally insignificant event that had no effect upon the Claimant, Respondent offers an Expert Report of Jorge Enrique Ibáñez Najar. Respondent and Dr. Ibáñez go to great lengths to argue that, because a petition for annulment is an "extraordinary" measure rather than an "ordinary recourse", the Constitutional Court's Order 188/14 denying the petitions to annul its 2011 decision "did not alter in any way the pre-treaty status quo" and thus "cannot be considered as a separate action" by Respondent giving rise to a claim.<sup>85</sup> In truth, however, Order 188/14 dramatically changed the pre-treaty *status quo* by denying the petitions for annulment of the 2011 decision and ending all judicial labor in the litigation that had been

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<sup>85</sup> Respondent's Counter-Memorial on Jurisdiction ¶¶ 183-84

brought by Claimant's companies with respect to her investments. The particular procedural status of the Order does not deprive it of its nature as a State measure in violation of the TPA.

89. There can be no serious contention that Order 188/14 is not a State measure attributable to Respondent.<sup>86</sup> The Order was an official act of Colombia's Constitutional Court, similar to that body's 2011 decision, which had particular legal consequences for Claimant's companies. The Order denied Claimant's and the Council of State's petitions for annulment, which were pending as of the TPA's entry into force, and which had properly sought reinstatement of the Council of State's November 1, 2007 Judgment. Rather than reinstating the 2007 Judgment, the Order served to deny Claimant her last avenue of judicial recourse and to definitively put an end to the litigation proceedings.

90. Respondent's observation that petitions for annulment are treated by Colombian law as a distinct procedure rather than an appeal from the main proceeding does nothing to change their character as State measures that adversely affected Claimant. Like the very *tutela* proceedings that led to the Constitutional Court's

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<sup>86</sup> See ILC Articles on Responsibility of State for Internationally Wrongful Acts (2001), Art. 4.1 (conduct of any State organ, including an organ that exercises judicial functions, is considered an act of that State under international law), RL-0010.

2011 decision,<sup>87</sup> the annulment petitions, if granted, would have had substantial legal consequences -- *i.e.*, reversal of the 2011 decision and restoration of Claimant's rights.

91. Respondent seeks to paint the petitions for annulment that led to Order 188/14 as pointless requests but is forced to acknowledge that such petitions are an established feature of Colombian jurisprudence. Respondent admits that on forty-nine occasions between 1996 and 2019, such petitions were filed against Constitutional Court decisions and were considered by that court. Four of the forty-nine petitions were successful, including one case in which the Constitutional Court's initial decision had violated due process in the process of issuing a supposedly "unifying judgment."<sup>88</sup> This success rate in excess of eight percent reflects that an annulment petition presents a meaningful opportunity for judicial recourse, notwithstanding the supposedly "final" nature of the Constitutional Court decision (or,

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<sup>87</sup> See Ibáñez Report, ¶¶ 65-70 (Council of State's judgment "has *res judicata* effect" and only extraordinary remedies, specifically *tutela*, were available against it). Dr. Ibáñez also notes that the *tutela* is "a legal instrument of a residual nature". *Id.* ¶ 79.

<sup>88</sup> Respondent's Counter-Memorial on Jurisdiction ¶138; Ibáñez Report, ¶¶ 155-56. Indeed, Justices Rojas Ríos and Pretelt Chaljub issued strong dissenting opinions explaining why the annulment petitions in the instant case should have been granted. C-26, C-27.

indeed, of the Council of State judgment that preceded it).<sup>89</sup>

92. A 2016 order of the Constitutional Court in a different case, authored by Justice Rojas Ríos (who had dissented from the 2014 Order) explains the nullification procedure under Colombian law and summarizes the essential caselaw on the subject.<sup>90</sup> The order notes that no appeal is available against Constitutional Court decisions, but that the court has recognized the exceptional possibility of seeking their nullification. In connection with *tutela* review decisions, constitutional jurisprudence allows the possibility of annulling those decisions in special circumstances where due process is seriously affected. These proceedings do not involve a *de novo* review of the merits of the case; rather, the petitioner must explain in a clear and precise manner the constitutional precepts that have been violated and their role in the challenged decision.<sup>91</sup>

93. Order 347/16 explains the procedural and substantive requirements for an annulment petition. With respect to procedure, (i) the petition

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<sup>89</sup> The eight percent success rate is also much higher than the approximately 1% success rate of certiorari petitions to the U.S. Supreme Court, which the *Loewen* claimants were faulted for failing to pursue.

<sup>90</sup> Auto 347/16, *Solicitud de nulidad de la Sentencia T-611 de 2014*, 3 August 2016, CL-0152.

<sup>91</sup> Auto 347/16, section III.3.

must be submitted within three days of the challenged order; (ii) it must be submitted by either a party to the case or by a third party that is affected by the order; and (iii) the petitioner may not simply reargue the merits of the challenged decision, but must clearly explain the constitutional precepts that have been violated and their role in the decision.<sup>92</sup> In this case, it is undisputed that the petition was timely submitted by Claimant's companies, thus satisfying the first two requisites,<sup>93</sup> and it is indisputable that the petition made the requisite constitutional arguments, rather than simply rearguing the merits.<sup>94</sup>

94. With respect to substance, an annulment petition must present an apparent, proven, significant, and far-reaching effect on due process rights, such as (for example), when the challenged judgment ignores constitutional *res judicata*.<sup>95</sup> Here, too, Claimant's petition (as well as the Council of State's petition) met the requisite standard.<sup>96</sup> And, as explained in the May 24, 2019 and December 10, 2019 Expert Reports of Dra.

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<sup>92</sup> *Id.*, section III.3.1; *see also* Ibáñez Report, ¶¶ 149-52.

<sup>93</sup> Respondent's Counter-Memorial on Jurisdiction ¶ 132; C-26.

<sup>94</sup> R-59.

<sup>95</sup> Auto 347/16, section III.3.2; *see also* Ibáñez Report, ¶ 153.

<sup>96</sup> *See* Claimant's petition, Exhibit C-0031; Council of State's petition, Exhibit C-0025.

Martha Teresa Briceño de Valencia,<sup>97</sup> as well as the dissenting opinions of Justice Rojas Ríos and Justice Pretelt Chaljub,<sup>98</sup> the Constitutional Court's 2011 decision was rife with due process violations. Accordingly, Claimant's annulment petition was a proper and, indeed, necessary next step in the judicial process following the erroneous 2011 decision.

95. Finally, it is important to note that the petition for annulment was not a mere successive petition for reconsideration, as had been the case in *ST-AD v. Bulgaria*. Nor was it simply a reargument of the merits of the *tutela* petitions that led to the Constitutional Court's 2011 decision. Rather, the petition properly invoked the appropriate procedures under Colombian law for annulling a Constitutional Court decision that had violated the due process rights of Claimant and her companies. The Constitutional Court's denial of this petition in Order 188/14 was thus a substantial and meaningful State measure that severely prejudiced Claimant with respect to her investments.

96. For all of the foregoing reasons, because the investment dispute that is before this tribunal is based upon the challenged State measure, *i.e.*, the Constitutional Court's issuance of

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<sup>97</sup> The latter report is being submitted herewith.

<sup>98</sup> C-26, C-27.

Order 188/14 on June 25, 2014, this arbitration was timely commenced.

**B. Claimant's Claims Fall Within the Temporal Scope of the TPA**

**1. Claimant's Claims Are Based Upon a Measure Taken by Colombia After the TPA Entered Into Force**

97. Respondent also argues that the tribunal lacks jurisdiction *ratione temporis* because Claimant's claims "are based on alleged State acts or omissions that took place before the TPA entered into force."<sup>99</sup> Leaving aside the fact that the State's acts and omissions are matters of public record and are not merely "alleged", Claimant contends that Order 188/14, which indisputably post-dates the TPA's entry into force, violated the TPA, giving rise to her claims.

98. There is no dispute that the TPA entered into force on May 15, 2012, nor that Order 188/14 was issued thereafter, on June 25, 2014.<sup>100</sup> Thus, Respondent's argument based upon the entry-into-force date is unfounded.

99. Respondent's argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its

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<sup>99</sup> Respondent's Counter-Memorial on Jurisdiction, part III.B.1, p. 80.

<sup>100</sup> Respondent's Counter-Memorial on Jurisdiction, ¶ 181.

entry into force. Claimant has no quarrel with this proposition, which, as Respondent notes, is grounded in Art. 28 of the VCLT. However, and as noted above in connection with the limitations-period discussion, the fact that Respondent engaged in relevant actions both prior to and subsequent to the TPA's entry into force does not provide Respondent with a blanket exemption from responsibility under the TPA. Rather, the TPA imposes responsibility upon Respondent for measures taken by Respondent after the TPA's entry into force -- including the issuance of Order 188/14.

100. As the tribunal explained in *Chevron Corp. v. Ecuador (I)*,<sup>101</sup> a claimant may maintain a treaty claim based upon a State measure after the treaty's entry into force, even though other State conduct related to the measure occurred prior to the treaty's effective date:

The Tribunal accepts that, according to Article 13 of the ILC Draft Articles, acts or facts prior to the entry into force of the BIT cannot on their own constitute breaches of the BIT, given that the norms of conduct prescribed by the BIT were not in effect prior to its date of entry into force. Moreover,

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<sup>101</sup> *Chevron Corp. v. Ecuador*, UNCITRAL, PCA Case No. 34877 (Interim Award) (December 1, 2008) ¶¶ 282-84, CL-0157.



the Tribunal agrees with the decision in the *Mondev* case that “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force” does not justify a tribunal applying the treaty retrospectively to that conduct. That rule is also embodied in Article 14(1) of the Draft ILC Articles:

The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

However, as the Claimants have argued, this does not mean that a breach must be based solely on acts occurring after the entry into force of the BIT. The meaning attributed to the acts or facts post-dating the entry into force may be informed by acts or facts pre-dating the BIT; that conduct may be considered in determining whether a violation of BIT standards has occurred after the date of entry into force. The Tribunal again agrees with the passage from the *Mondev* award cited by the Claimants in this regard:

[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it still must be possible to point to conduct of the State after that date which is itself a breach.

In the present case, a portion of Respondent's alleged acts or omissions constituting a denial of justice may pre-date the entry into force of the BIT. A finding of denial of justice may thus require taking into account pre-BIT acts. However, as already discussed, the Claimants held an "existing investment" at the time of entry into force of the BIT. That investment, as it exists, has been influenced by acts and omissions occurring prior to the entry into force of the BIT. The Tribunal is thus satisfied that the alleged improper action or inaction by the Ecuadorian courts post-dating the BIT's entry into force could still amount to a denial of justice that, in turn, could constitute a violation of the BIT's substantive standards.

101. As noted by the *Chevron* tribunal, the *Mondev* award also supports the proposition that State conduct straddling the treaty's entry into force does not remove the resulting treaty claims from the tribunal's jurisdiction. Acknowledging that the Claimant's claim under Art. 1105(1) of NAFTA covered both pre- and post-entry-into-force conduct, the tribunal found that the treaty only imposed substantive obligations with respect to the latter. The tribunal emphasized, however, that "it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force."<sup>102</sup> The tribunal concluded that it had jurisdiction to consider whether the post-entry-into-force conduct of Respondent's courts in dismissing the Claimant's claims (which were based upon earlier conduct) violated the treaty.<sup>103</sup>

102. Decisions interpreting the International Covenant on Civil and Political Rights ("ICCPR") and its Optional Protocol have applied similar principles in considering the effects of judicial decisions on jurisdiction *ratione temporis*. A judicial decision that serves as a final affirmation of previous state action represents the rationale of

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<sup>102</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Award) (October 11, 2002), ¶ 69, CL-0045.

<sup>103</sup> *Id.* ¶ 66-75 & *dispositif*.

ratifying and incorporating any defects in the previous state action for purposes of such jurisdiction. This is so even if the previous action occurred before the relevant treaty came into force.

103. Thus, in *Blaga v. Romania*,<sup>104</sup> the petitioners' property was expropriated in 1989, with the expropriation upheld by court decisions in July and November 1992. Thereafter, the Optional Protocol to the ICCPR entered into force for Romania on October 20, 1993. On January 20, 1994, the Court of Appeal of Bucharest ordered restitution of the expropriated property, but this decision was quashed by the Supreme Court of Romania on May 8, 1996. The State argued that the Human Rights Committee lacked jurisdiction *ratione temporis* because the expropriation occurred well before the Optional Protocol had entered into force. However, the Committee found that the Supreme Court's decision had confirmed and re-affirmed the validity of the expropriation, bringing the claims within the Committee's jurisdiction.<sup>105</sup>

104. Similarly, in *Singarasa v. Sri Lanka*,<sup>106</sup> the petitioner was a member of the Tamil community in Sri Lanka who was arrested in 1993

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<sup>104</sup> Comm. 1158/2003, U.N. Doc. A/61/40, Vol II, at 242 (HRC 2006) , CL-0340.

<sup>105</sup> Id. ¶ 6.4.

<sup>106</sup> Comm. 1033/2001, U.N. Doc. A/59/40, Vol. II, at 246 (HRC 2004) , CL-0338.

and allegedly suffered torture and a series of other human rights violations resulting in his conviction on criminal charges in 1995. The ICCPR Optional Protocol entered into force for Sri Lanka in 1998. The petitioner's conviction was affirmed in 1999 and the Supreme Court refused him special leave to appeal. In confirming that it had jurisdiction *ratione temporis*, the Human Rights Committee noted its prior jurisprudence holding that it was:

[p]recluded from considering a communication if the alleged violations occurred before the entry into force of the Optional Protocol, unless the alleged violations continue or have continuing effects which in themselves constitute a violation of the [ICCPR].<sup>107</sup>

105. Accordingly, the Committee reasoned that:

[a]lthough the author was convicted at first instance on 29 September 1995, i.e., before the entry into force of the Optional Protocol for the State party, the judgement of the Court of Appeal upholding the author's conviction, and the Supreme Court's order refusing leave to appeal were both rendered on

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<sup>107</sup> *Id.* ¶ 6.3 (citing, e.g., *Holland v. Ireland*, Comm. 593/1994, U.N. Doc. A/52/40, Vol II, at 266 (HRC 1996)).

6 July 1999 and 28 January 2000, respectively, after the Optional Protocol came into force. The Committee considers the appeal courts decision, which confirmed the trial courts conviction, as an affirmation of the conduct of the trial. In the circumstances, the Committee concludes that it is not precluded *ratione temporis* from considering this communication.<sup>108</sup>

106. The Committee's decision in *Kouidis v. Greece*<sup>109</sup> reflects the same principle. In *Kouidis*, the petitioner was arrested, interrogated, found guilty and had his conviction affirmed on appeal before the Optional Protocol entered into force for Greece on August 5, 1997. However, the Committee found that it had jurisdiction *ratione temporis* to consider his claims that his rights were violated during the trial, because the Greek Supreme Court's 1998 confirmation of the appellate court's 1996 judgment "constitute[d] an affirmation of the conduct of the trial."<sup>110</sup>

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<sup>108</sup> *Id.* ¶ 6.3. The Committee did find that it lacked jurisdiction *ratione temporis* as to specific claims, such as pretrial detention, that involved conduct not underlying the conviction and its affirmance on appeal.

<sup>109</sup> Comm. 1070/2002, U.N. Doc. A/61/40, Vol. II, at 145 (HRC 2006) , CL-0339.

<sup>110</sup> *Id.* ¶ 6.5.

107. Accordingly, Respondent's issuance of Order 188/14 after the TPA's entry into force was subject to the TPA, and Claimant's claims based upon it are within the tribunal's jurisdiction, notwithstanding the existence of prior conduct by Respondent that led up to the issuance of the Order.

108. As noted in Parts A(3) and A(4) above, Respondent's citation of *Spence v. Costa Rica* and several other awards in an effort to artificially impose additional restrictions on the application of Art. 11(5)'s limitations period is unavailing. In any event, and distinguishing this matter from the cases cited by Respondent such as *Corona* and *ST-AD*, this case does not involve an effort by Claimant to artificially revive old claims after the TPA had come into force. To the contrary, the petition to vacate the Constitutional Court's judgment was filed (along with that of the Council of State) in December 2011, well before the TPA entered into force on May 15, 2012.

109. Moreover, Claimant's petition was hardly a pointless or meaningless act. Respondent, and its expert, concede that there is a formal mechanism for filing such a petition -- and, indeed, that four of forty-nine such petitions (*i.e.*, more than eight percent) have historically been successful.<sup>111</sup> In contrast, the odds of successfully petitioning for certiorari review from the United

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<sup>111</sup> Respondent's Counter-Memorial on Jurisdiction, ¶ 133; Expert Report of Jorge Enrique Ibáñez Najjar, ¶¶ 139-154-55.

States Supreme Court are approximately 1%<sup>112</sup> -- and thus the odds of ultimately prevailing in that Court are even lower.<sup>113</sup> Yet such petitions are routinely pursued as reasonable efforts to obtain remedies, and the *Loewen* Claimants were faulted by that tribunal for failing to do so.<sup>114</sup>

110. Significantly, the Council of State also believed that pursuit of a petition to vacate the Constitutional Court's decision was a sufficiently meaningful course of action to warrant doing so.

111. Thus, Claimant's petition to vacate the Constitutional Court's order was an appropriate and prudent exercise of her rights -- and can in no way be considered an improper effort to fabricate a theoretical State measure as a basis for invoking the TPA.

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<sup>112</sup> *E.g.*, Harvard Law Review, *The Supreme Court 2017 Term - The Statistics*, 132 Harv.L.Rev. 447, 455 tbl II(B) (2018) , CL-347; Harvard Law Review, *The Supreme Court 2016 Term - The Statistics*, 131 Harv.L.Rev. 403, 410 tbl II(B) (2017) , CL0346.

<sup>113</sup> *E.g.*, Harvard Law Review, *The Supreme Court 2017 Term - The Statistics*, 132 Harv.L.Rev. 447, 455 tbl II(D) (2018) , CL-0347; Harvard Law Review, *The Supreme Court 2016 Term - The Statistics*, 131 Harv.L.Rev. 403, 456 tbl II(D) (2017) , CL-0346.

<sup>114</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Award) (June 26, 2003), ¶¶ 207-17, CL-0183.



## 2. Respondent's Pre-TPA Conduct Does Not Bar Claimant's Claims

### a. No Exclusion of Pre-Entry-Into-Force "Disputes"

112. Finally, Respondent's suggestion that the arbitral tribunal lacks jurisdiction *ratione temporis* because the "dispute [supposedly] arose prior to entry into force of the TPA"<sup>115</sup> has no foundation in the text of the TPA nor in customary international law.

113. The non-retroactivity presumption described in Art. 28 of the VCLT and the intertemporal principle described in Art. 13 of the ILC Articles concern the temporal application of treaties to State acts -- not to disputes. Article 28 provides as follows:

#### Non-Retroactivity of Treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to *any act or fact which took place or any situation which ceased to exist* before the date of the entry into force of the treaty with respect to that party.

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<sup>115</sup> Respondent's Counter-Memorial on Jurisdiction ¶¶ 197-202.

(emphasis supplied).

114. Similarly, ILC Art. 13 provides:

*International obligation in force for a State*

An *act* of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question *at the time the act occurs*.

(emphasis supplied).

115. In contrast to these rules, there is no general principle of international law that would render the TPA inapplicable to “disputes”, as distinct from “acts”, pre-dating its entry into force. Nor does the TPA itself provide any such rule.

116. Respondent cites Art. 10.1.3 of the TPA for the proposition that “[i]n the application of investment treaties, one of the temporal dimensions that is governed by the principle of non-retroactivity relates to the moment in which the *dispute* arose.”<sup>116</sup> But Art. 10.1.3 does not say that at all. Rather, Art. 10.1.3 (which was not among the few enumerated provisions that were incorporated into TPA Chapter 12) simply restates VCLT Art. 28’s non-retroactivity principle described above:

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<sup>116</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 198 & n. 496 (emphasis supplied).

For greater certainty, this Chapter [10] does not bind any Party in relation to any *act or fact that took place or any situation that ceased to exist* before the date of entry into force of this Agreement.

(emphasis supplied).

117. Thus, nothing in the TPA alters the general rule that the treaty does not impose obligations with respect to *acts* (as opposed to disputes) that predated its entry into force.

118. The principal case cited by Respondent in connection with its argument, *Lucchetti v. Peru*,<sup>117</sup> does not support the contention that pre-existing “disputes” fall outside the coverage of BITs as a general principle. To the contrary, *Lucchetti’s* exclusion of a supposedly pre-existing dispute was based upon specific exclusionary language in Art. 2 of the Peru-Chile BIT, which expressly provided that the BIT “shall not, however, apply to differences or disputes that arose prior to its entry into force.”<sup>118</sup>

119. Similarly, the award in *Vieira v. Chile*, also relied upon by Respondents, does not purport to establish a general exclusion of pre-existing disputes from BIT coverage. Rather, similar to

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<sup>117</sup> *Empresas Lucchetti, S.A. et al. v. Republic of Perú*, ICSID Case No. ARB/03/04 (Award) (February 7, 2005), RL-0020.

<sup>118</sup> *Lucchetti*, ¶ 25, RL-0020.

*Lucchetti*, the decision was based upon specific language in Art. 2.3 the Chile-Spain BIT providing that it “shall not apply ... to disputes or claims arising or resolved prior to its entry into force.” (informal translation).<sup>119</sup>

120. Indeed, inclusion of this language in the two Chilean BITs addressed by *Lucchetti* and *Vieira* served a specific purpose: to preclude jurisdiction over investment disputes that would otherwise fall within the treaty’s scope. As the *Lucchetti* annulment committee reasoned:

[T]he purpose of the exception must be assumed to be to prevent that, where a dispute or a difference had arisen at a time when the BIT did not exist, the investor would be provided with new ammunition as a result of the subsequent entry into force of the BIT.<sup>120</sup>

The treaty provision language providing for the exception would be superfluous if pre-existing disputes were already excluded as a general principle. Accordingly, absent an express exception

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<sup>119</sup> *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7 (Award) (August 21, 2007), ¶¶ 227-34. Article 2.3 provides, in the original Spanish, that “[n]o se aplicará ... a las controversias o reclamaciones surgidas o resueltas con anterioridad a su entrada en vigor.”, RL-0075.

<sup>120</sup> *Lucchetti v. Peru*, ICSID Case No. ARB/03/4 (Decision on Annulment) (September 5, 2007), ¶ 80, RL-0067.

such as those contained in the Chilean BITs, there is no general exclusion of pre-existing disputes from an arbitral tribunal's jurisdiction under an investment treaty.

121. The tribunal in *Chevron Corp. v. Ecuador (I)*, in construing the Ecuador-U.S. BIT (which, like the TPA, defined the treaty's temporal scope in language that made no reference to "disputes"), explained the general rule:

[U]nder Article XII(1), the present BIT applies as long as there are "investments existing at the time of entry into force." The BIT's temporal restrictions refer to "investments" and not disputes. Thus, the BIT covers any dispute as long as it is a dispute arising out of or relating to "investments existing at the time of entry into force."

Again, this is not an issue of retroactivity, but of application of the specific rule to be found in Article XII of the BIT. The *Lucchetti* and *Vieira* decisions were based on the wording in the respective BITs' temporal provisions. In contrast to the present BIT, those BITs specifically concerned themselves with temporal restrictions on "disputes" and not just "investments."

Given the fulfillment of the temporal conditions of Article XII(1) and the absence of any further temporal restrictions on disputes, the word “disputes” must simply be given its ordinary meaning... The ILC Commentary of Sir Arthur Watts, also cited by the claimants, repeats this idea:

The question has come under consideration in international tribunals in connexion with jurisdictional clauses providing for the submission to an international tribunal of “disputes,” or specified categories of “disputes,” between the parties. The Permanent Court said in the *Mavrommatis Palestine Concessions* case:

‘The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment ... The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of

the rule of interpretation enunciated above.’

This is not to give retroactive effect to the agreement because, by using the word “disputes” without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes *existing* after the entry into force of the agreement.<sup>121</sup>

122. A similar example is provided by *Mondev v. United States*, where the parties were in agreement that “the dispute as such arose before NAFTA’s entry into force”, but the tribunal found jurisdiction *ratione temporis* over the claims concerning State conduct after that date. The tribunal expressly noted the intertemporal principle as the basis for its focus on the timing of *conduct* as the governing standard.<sup>122</sup>

123. Recognizing that *Lucchetti’s* and *Vieira’s* rejection of pre-treaty disputes on *ratione temporis* grounds was premised on express exclusions in the relevant treaty language rather

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<sup>121</sup> *Chevron Corp. v. Ecuador*, UNCITRAL, PCA Case No. 34877 (Interim Award) (December 1, 2008), ¶¶ 265-67 (quoting II THE INTERNATIONAL LAW COMMISSION 1949-1998 p. 670 (Sir Arthur Watts, ed., Oxford University Press 2000)), CL-0157.

<sup>122</sup> *Mondev International Ltd. v. United State of America*, ICSID Case No. ARB(AF)/99/2 (Award) (11 October 2002), ¶¶ 57, 70, CL-0045.

than a generally applicable principle, Respondent cites *M.C.I. Power v. Ecuador*<sup>123</sup> and *Generation Ukraine v. Ukraine*<sup>124</sup> for the proposition that “[s]uch holding has applied even in instances in which the treaty did not expressly preclude claims relating to disputes that pre-date the treaty’s entry into force.”<sup>125</sup> Neither case, however, supports Respondent’s position.

124. It is true that the *M.C.I. Power* tribunal nominally concluded, based upon the principle of non-retroactivity, that “[t]he non-retroactivity of the [Ecuador-U.S.] BIT excludes its application to disputes arising prior to its entry into force.”<sup>126</sup> However, the tribunal stated its conclusion more specifically and made it plain that disputes based upon post-entry-into-force State conduct were *not* excluded from the BIT’s application:

[t]he principle of non-retroactivity of treaties limits the application of the BIT and its clauses to those *disputes*

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<sup>123</sup> *M.C.I. Power Group L.C. et al. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Award) (31 July 2007), RL-0008.

<sup>124</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Award) (16 September 2003), RL-0019.

<sup>125</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 199 & n. 498.

<sup>126</sup> *M.C.I. Power*, ¶ 61, RL-0008.



*that are alleged to be violations of that Treaty after it entered into force.*<sup>127</sup>

(emphasis supplied).

As is discussed in the following section (b), the *M.C.I. Power* tribunal's further discussion and application of the non-retroactivity principle made it plain that the tribunal was not using "dispute" in the broad sense contemplated by Respondent (or *Lucchetti*), but rather in the narrow sense and tied to specific pre-treaty State acts.<sup>128</sup>

125. *Generation Ukraine* is to the same effect. Respondent cites a sentence from the jurisdictional conclusions stating that "[t]he Tribunal's jurisdiction extends to any dispute arising out of or relating to an 'alleged breach of any right conferred or created by [the] Treaty ... to the extent that the dispute arose on or after [the date of entry into force].'"<sup>129</sup> But the tribunal's earlier explanation of its jurisdictional reasoning makes it plain that this conclusion concerns "disputes" over alleged treaty breaches, which can

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<sup>127</sup> *Id.* ¶ 167; *see id.* ¶ 190 ("The Tribunal confirms that it does have Competence over acts that are alleged by the Claimants to have given rise to disputes that arose or became evident after the entry into force of the BIT, independently of whether they had a causal link with, or served as the basis of, allegations concerning acts or disputes prior to the entry into force of the BIT.").

<sup>128</sup> *See id.* ¶¶ 62-66.

<sup>129</sup> Respondent's Counter-Memorial on Jurisdiction, ¶ 199 n. 498, citing *Generation Ukraine* ¶ 17.1.

only arise after the treaty is in force. In discussing the issue “relating to the jurisdiction of the Tribunal over investment disputes that came into existence before the BIT came into force”, the tribunal reasoned that:

[T]he obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on one of the BIT standards of protection must have arisen after 16 November 1996. ...

...

In conclusion, the Tribunal’s jurisdiction *ratione temporis* is limited to alleged expropriatory acts which occurred after 16 November 1996.<sup>130</sup>

126. Respondent also cites *ATA v. Jordan*<sup>131</sup> in support of its argument that tribunals lack jurisdiction *ratione temporis* over disputes that arose prior to the relevant treaty’s entry into

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<sup>130</sup> *Generation Ukraine*, ¶¶ 11.2, 11.4, RL-0019.

<sup>131</sup> *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No/ ARB/08/2 (Award) (May 18, 2010), RL-0018.

force. Claimant respectfully submits that the *ATA* award is simply not a persuasive precedent on this point. *ATA* concerned disputes arising under the 1993 Jordan-Turkey bilateral investment treaty, Art. IX of which contains an entry-into-force provision stating that the treaty “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.”<sup>132</sup> The tribunal concluded, without elaboration and without acknowledgement of the fact that Art. IX did not contain the word “dispute”, that:

[T]he provision does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. *Under the plain meaning of Article IX(1), the Tribunal may only exercise jurisdiction ratione temporis over the Claimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006.*<sup>133</sup>

127. Significantly, the tribunal reached its “plain meaning” conclusion without any analysis of Art. VII of the BIT concerning settlement of investor-state disputes. Like Art. IX, Art. VII of

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<sup>132</sup> *ATA*, ¶ 59, RL-0018.

<sup>133</sup> *Id.* ¶ 98 (emphasis supplied).

the treaty provides no support for the *ATA* tribunal's conclusion.

128. In the absence of any substantial explanation to justify its "plain meaning" analysis, the *ATA* tribunal's bald conclusions neither confirm the existence of a general principle of international law as claimed by Respondent nor advance reasons why one should be found to exist.

129. Accordingly, as there is no language in the TPA that excludes jurisdiction over "disputes" arising prior to its entry into force and no general principle of international law to that effect, Respondent's objection on this ground is unfounded.

**b. This "Dispute" Arose in 2014**

130. Even if Respondent were somehow correct in its (mistaken) contention that the TPA excludes from its scope all "disputes" that arose prior to its entry into force, the dispute in this case is different from the pre-TPA administrative litigation described by Respondent. This dispute concerns the violation by Respondent of its obligations under the TPA, and could not arise until the TPA entered into force.

131. Respondent cites the classic definition of dispute provided in the *Mavrommatis* case:<sup>134</sup> "a

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<sup>134</sup> *Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, Objection to the Jurisdiction of the Court, 30 August 1924, p. 11, RL-0022.

disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>135</sup> The *Mavrommatis* case focused on whether a dispute existed *at all* between the two State parties, not on the question of when a particular dispute arose, or which facts, circumstances, and legal claims fell within the scope of a single “dispute.” It is therefore unsurprising that this definition provides little guidance with respect to the latter two questions.

132. Respondent cites *Lucchetti*, *Eurogas*, *ATA*, and *Swissbourgh* in support of its contention that Claimant’s claims based upon violations of the TPA’s provisions (occurring after its entry into force) are part of the same general “dispute” dating back to 2000.<sup>136</sup> As the excerpts quoted by Respondent demonstrate, these decisions rested upon an assumption that facts and circumstances sharing the same “real cause” formed part of the same, indivisible “dispute”, rather than analyzing the term in its context within the relevant treaty and in light of the treaty’s object and purposes.<sup>137</sup> In

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<sup>135</sup> Respondent’s Counter-Memorial on Jurisdiction ¶ 201.

<sup>136</sup> Respondent’s Counter-Memorial on Jurisdiction, ¶¶ 211-17.

<sup>137</sup> See *Lucchetti*, ¶ 50 (announcing that standard is “whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other”), RL-0020; *Eurogas*, ¶ 451, RL-0013 (noting that the tribunal “approves” the *Lucchetti* approach); *ATA*, RL-0018, ¶ 102 (“find[ing] the *Lucchetti* holding persuasive” without supporting discussion other than a reference to Zeno’s paradox). For its part, the High Court in *Lesotho v. Swissbourgh Diamond Mines (Pty) Ltd*, RL-0027, found that

contrast, the better approach is to distinguish a

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the arbitral tribunal possessed jurisdiction *ratione temporis*, and the Court further criticized the *Lucchetti* analysis:

[McLachlan, Shore & Weiniger, *International Investment Arbitration: Substantive Principles*] observes at para. 6.69 that the [*Lucchetti*] tribunal's focus on subject-matter "runs counter" to the approach adopted by other tribunals which, in considering the meaning of "dispute", have typically focused "on the parties and the cause of action rather than the subject-matter", *ie*, a *lis-pendens*-type analysis.

I agree with these remarks. It would seem that the cause-of-action approach is a better way of ascertaining the real dispute than the subject-matter approach. Taking the former approach would clearly differentiate the facts that are *background to the dispute* from the facts that are *core to the claim*. Apart from providing a general sense of what the subject matter of the dispute was, I do not consider that the subject-matter approach assists one in drawing this distinction, which I consider to be important. I note, moreover, that the *Lucchetti v. Peru* tribunal ... based its criterion of "subject matter" on an earlier ICSID decision, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, which made the remark in a quite different context. ... Given the difference in context, the above remarks, and the ambiguity of the phrase "subject matter", I do not find the phrase in *Lucchetti v. Peru* particularly helpful as a test of distinctness, at least for present purposes.

*Id.*, ¶¶ 129-30.

dispute that alleges a treaty violation based upon post-entry-into-force State conduct from an earlier, if related dispute over conduct that entirely preceded the treaty.

133. Professor Gaillard's dissenting opinion in the *Eurogas* case described the flaws in the contrary approach followed by *Lucchetti* and the *Eurogas* majority. In light of the classic definition of a dispute articulated in *Mavrommatis*:

[I]t follows that a dispute arises at the moment a disagreement is formed between the parties over points of law or fact. In turn, a disagreement is formed once the claims or positions of one of the parties over those points of law or fact are contested or ultimately ignored by the other. A dispute, therefore, presupposes the existence of the factual and legal framework on which the disagreement is based and ***cannot arise until the entirety of such constituent elements has come into existence.***

...

In the context of determining the subject and scope of the dispute, the *Mavrommatis* definition calls for an assessment that encompasses ***all relevant facts and elements***

*constituting the parties' disagreement, as conveyed in their submissions.* It is therefore not sufficient to carry out an analysis that is limited to searching for the “*real causes*” of the dispute, particularly when this results in overlooking key and distinctive features of the dispute.

For this reason, I find the Majority's approach to the definition of the dispute before the Tribunal to be too reductive and inconsistent with the well-established *Mavrommatis* definition. When stating that “[w]hat matters is the real cause of the dispute,” basing its conclusion on the award rendered in *Lucchetti v. Peru* and the PCIJ decision in *Phosphates in Morocco*, the Majority disregards key features of the dispute, focusing on early events instead of considering the dispute as a whole, as submitted by the parties.

In its search for the “*real causes*” of the dispute, the Majority ends up reducing the dispute to its most abstract element ..., and overlooks aspects of the dispute that concern the concrete circumstances in which the legal acts that allegedly brought about this reassignment occurred. ...



In other words, by limiting the dispute to its alleged “real causes” instead of analyzing all the relevant factual and legal circumstances leading to the disagreement brought before the Tribunal, the Majority departed from the *Mavrommatis* definition of “dispute” it purports to apply.<sup>138</sup>

134. Similarly, the tribunal in *M.C.I. Power v. Ecuador*, cited by Respondent, tied its definition of “dispute” in this context to the act alleged to have violated the treaty in question:

[T]he non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. ...

The Tribunal distinguishes acts and omissions prior to the entry into force of the BIT from acts and omissions subsequent to that date as violations of the BIT. The Tribunal holds that a dispute that arises that is subject to its Competence is necessarily *related*

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<sup>138</sup> *Eurogas*, dissenting opinion of Prof. Emmanuel Gaillard, 6 July 2017, ¶¶ 9, 12-14, 26-27 (bold emphasis supplied) (footnotes omitted), CL-0170.

*to the violation of a norm of the BIT by act or omission subsequent to its entry into force.*

...

With respect to acts or omissions alleged by the Claimants to be breaches of the BIT subsequent to its entry into force, the Tribunal considers that it has Competence insofar and as those facts are proven to be a violation of the BIT. ...

The Tribunal likewise distinguishes disputes arising prior to the entry into force of the BIT from *disputes arising after that date that have the same cause or background with those prior disputes*.<sup>139</sup>

Thus, a dispute based upon an act or omission after the treaty has entered into force is distinct from even related disputes that pre-date the treaty, and it falls within the treaty's scope and the tribunal's competence. *Generation Ukraine*, also cited by Respondent, follows the same approach.<sup>140</sup>

135. *Jan de Nul v. Egypt* presents still another example. Similar to *Lucchetti* and *Vieira*,

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<sup>139</sup> *M.C.I. Power v. Ecuador*, ¶¶ 61-62, 64-65 (emphasis supplied), RL-0008.

<sup>140</sup> *Generation Ukraine*, ¶¶ 11.2, 11.4, RL-0019.

*Jan de Nul* involved a BIT containing a provision that it shall “not be applicable to disputes having arisen prior to its entry into force.”<sup>141</sup> In the latter case, the parties’ differences arose with a contract dispute prior to that BIT’s entry into force, and continued with litigation proceedings that culminated in a court decision after the BIT had come into effect. In concluding that the BIT’s provision excluding prior disputes did not deprive it of jurisdiction *ratione temporis*, the tribunal distinguished between the contract dispute involved in the litigation proceedings (which had arisen prior to the treaty) and the investor-state dispute that followed. Although “the domestic dispute antedated the international dispute and ultimately led towards it”, the disputes involved different parties and different types of claims. Moreover, the tribunal concluded, the two disputes would be distinct even under the *Lucchetti* standard.<sup>142</sup>

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<sup>141</sup> *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Decision on Jurisdiction) (June 16, 2006), ¶ 33, CL-0038.

<sup>142</sup> *Jan de Nul* (Decision on Jurisdiction), ¶¶ 110, 116-20, 126-29, CL-0038; *see* (Award), ¶ 129, CL-177. Because it considered the *Lucchetti* standard to have been satisfied, the tribunal noted in its decision on jurisdiction that “[u]nder these circumstances, the Tribunal does not need to consider the holding of the *Lucchetti* tribunal that “[t]he allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving

136. Accordingly, for all of the foregoing reasons, the tribunal has jurisdiction *ratione temporis* over Claimant's claims because (1) this arbitration was timely commenced within the applicable 5-year limitations period, and (2) Claimant's claims fall within the temporal scope of the TPA. Respondent's objection to jurisdiction *ratione temporis* should therefore be rejected.

## II. CLAIMANT MEETS THE *RATIONE VOLUNTATIS* JURISDICTIONAL PREDICATE WHICH HAS NOT BEEN REBUTTED

### A. Preliminary Statement

137. Article 12.1.2(b) incorporates two protection standards into Chapter 12 (Financial Services) from Chapter 10 (Investment) that were not present in Chapter 12: Articles 10.7 (Expropriation and Compensation) and 10.8 (Transfers).<sup>143</sup> This provision, Art. 12.1.2(b), also incorporated Section B (Investor-State Dispute Settlement) into Chapter 12. As established below, Art. 12.1.2(b) supplements and does not restrict the

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of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT.” (¶ 129 n. 41).

<sup>143</sup> Articles 10.12 (Denial of Benefits) and 10.14 (Special Formalities and Information Requirements) are not standards of protection. They impose obligations on investors and amplify the contracting Parties' legislative and regulatory sovereignty.

enforceability of Chapter 12 treatment protection standards.

138. The applicable interpretive methodology corresponding to Art. 12.1.2(b) renders enforceable all substantive protections in Chapter 12, including Art. 12.2 (National Treatment), and provides for an interpretation of Art. 12.3 (MFN) that allows for the importation of a more favorable five-year limitations period from Art. 11(5) of the Colombia-Switzerland BIT. Hence, it is here established that the Parties consented to submitting to investor-State arbitration the treatment protection standards contained in Chapter 12.

139. Respondent's Counter Memorial asserts a reading of Art. 12.1.2(b) that literally eviscerates the rights of Financial Services investors from enforcing *any* of the Chapter 12 treatment protection standards, including Articles 12.2 (National Treatment), 12.3 (MFN), 12.4 (Market Access for Financial Institutions), and 12.5 (Cross-Border Trade).

140. In fact, pursuant to Respondent's interpretive methodology, even Art. 11.10 (Transfers and Payments), which is incorporated into Chapter 12 pursuant to Art. 12.1.2(c), and read together with Art. 12.5 (Cross-Border Trade), is

rendered unenforceable on the part of Financial Services investors.

141. As will be detailed, Respondent's reading of Art. 12.1.2(b) is not sustainable. It requires the interpreter to look askance at the Agreement's (i) ordinary textual language, (ii) drafting context and historicity, (iii) purpose as a trade protection agreement having a separate Financial Services Chapter related to but distinct from an Investment Chapter, (iv) contemporaneous writings, (v) testimony before the House of Representatives Committee on Banking, Finance, and Urban Affairs ("the Committee" or "House Committee"), (vi) the Parties' treaty practice, (vii) the structural and substantive features of the TPA, and (viii) the unchallenged testimony of the US lead negotiator of the NAFTA's Chapter 14 (Financial Services) upon which Chapter 12 (Financial Services) of the TPA is undisputably patterned.

142. The untested assumption that Chapter 12 of the TPA, and the TPA as a whole, must be interpreted as if it were a BIT, simply misses the mark. A BIT and a TPA are structurally and substantively different. Hence, their respective purpose, context, language and drafting history must be considered in interpreting each specific instrument.

143. Consideration of these factors is particularly important in this case because there is no precedent construing the scope or enforcement of a national treatment protection standard in a Financial Services Chapter of a TPA or FTA.

144. Similarly, there is no precedent construing the scope and application of an Most-Favored-Nation (“MFN”) Clause in a Financial Services Chapter of a TPA or FTA.

145. Unlike a BIT, among many formal and substantive differences, the TPA here at issue has two MFN clauses and two national treatment provisions.

146. In this same vein, the TPA, unlike the vast majority of BITs, deliberately distinguishes between two classes of investors: Chapter 10 (Investment) and Chapter 12 (Financial Services) investors. Each, for example, under the TPA is accorded national treatment and MFN treatment protection standards, yet the language and qualifications of the respective provisions differ. They do so, in large measure, because cross-border investments in the Financial Services sector are subject to a greater degree of vulnerability arising from the highly regulated environment that contextualizes such investments.

147. The substantive provisions contained in Chapter 12 (Financial Services) seek to protect

this distinct class of investors and investments while also making allowances for a host-State's legitimate exercise of regulatory and legislative authority. It does so by providing contracting Parties with latitude in the form of prudential measures exception, Art. 12.10 (Exceptions), among others.

148. As demonstrated in its Counter Memorial, Respondent in turn invites this Tribunal to transpose Financial Services investors into Chapter 10 (Investment) and to accord them two protection standards and an unenforceable MFN clause: Articles 10.7 (Expropriation and Compensation) and 10.8 (Transfers). Despite a surface appeal, the invitation is not one worth pursuing.

149. Quite remarkable, even were Respondent's approach followed, consent is present with respect to Art. 10.7 (Expropriation and Compensation), as Respondent cannot seriously challenge that the contracting Parties consented to having Financial Services investors enforce the expropriation protection standard explicitly incorporated into Chapter 12 (Financial Services), pursuant to Art. 12.1.2(b), in order to supplement the Chapter 12 treatment protection standards.



This much Respondent concedes, as it should and must.<sup>144</sup>

150. Therefore, the Tribunal is invited to consider Respondent's consent objection with respect to Art. 12.1.2(b) as one pertaining to the scope of consent only. Indeed, no premise has been advanced challenging the parties' consent to submit the expropriation and compensation treatment protection standard to investor-State settlement.

**1. The Plain Meaning of Chapter 12 Provides for Enforceable National Treatment (Art. 12.2) and Expansive MFN Treatment (Art. 12.3)**

**a. The Plain Language of Art. 12.1.2(b) Demonstrates Consent to Provide Financial Services Investors with Enforceable National Treatment and Most-Favored-Nation Treatment Protection Standards to Recover Compensatory Damages for Proven Violations**

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<sup>144</sup> See Respondent's Counter Memorial ¶ 301, n. 661: "Colombia acknowledges that Claimant can submit a claim to arbitration of an alleged breach of the expropriation provision (Article 10.7) of the TPA [citation omitted]."

151. Despite prolix reference to a “plain meaning” reading of material provisions of the TPA<sup>145</sup> and to application of VCLT Articles 31 and 32,<sup>146</sup> Respondent nowhere engages in any sustained analysis of Art. 12.1.2(b). Respondent’s Counter Memorial ignores this provision’s relation to Articles 12.2 (National Treatment) and 12.3 (MFN). Nowhere in Respondent’s Counter Memorial does Respondent even attempt to reconcile its interpretation of Art. 12.1.2(b) in connection with *any*, let alone all substantive rights and obligations set forth in Chapter 12. Stated simply, Respondent does not even attempt to reconcile its interpretation of Art. 12.1.2(b) with the workings and substantive provisions of Chapter 12. Instead, as will be demonstrated, Respondent pursues a piecemeal “cut and paste” approach to legal analysis, and engages in a less than a meaningful selection of adverbs.<sup>147</sup>

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<sup>145</sup> Indeed, the concept of plain text or meaning in this sense is mentioned at least ten times (paragraphs 162, 254, FN 582, 304, 309 (twice), 310 [title (c)], 322 [title (3)], 343, and 393.)

<sup>146</sup> The references to VCLT are eleven (11) total. Two (2) times concerning Art. 28, and nine (9) times related to Articles 31 or 32. See, paragraphs 163 and footnote 429 for Art. 28, and paragraphs 253 (twice), 305, 353, 377, and footnotes 571, 600, 665, 692 for Articles. 31 and 32.

<sup>147</sup> Unfortunately, instead of engaging in a merits-based analysis Respondent uses words such as “disingenuously” to characterize the work product of colleagues. (See ¶¶ 314-315 of

152. In particular, Respondent argues that because Chapter 12 “does not contain a dispute resolution mechanism of its own,” somehow the Art. 12.3 MFN clause is qualified and restricted only (i) to the importation of unenforceable substantive rights, and (ii) to be applied by States, presumably (it is not clear) in government-to-government arbitration.<sup>148</sup> Respondent does not offer any textual evidence in support of this unworkable proposition. In addition, Respondent engages in a “plain meaning” analysis that wrests substantive content and practical application from *all* Chapter 12 substantive provisions, including Articles 12.2 (National Treatment) and 12.3 (MFN).

153. Respondent’s plain meaning analysis is foundationally flawed when extended to its necessary and legal consequences. It ignites a dynamic that renders unenforceable and unworkable all of the Chapter 12 substantive provisions while inviting tortured constructions of the Chapter’s procedural provisions: Articles 12.18 (Dispute Settlement), and 12.19 (Investment Dispute in Financial Services). The Respondent’s purported VCLT Articles 31 and 32 analysis is as follows.

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Respondent’s Answer on Jurisdiction) This practice is substantively of no moment and aesthetically undesirable.

<sup>148</sup> Respondent’s Counter Memorial on Jurisdiction¶ 303.

## 2. Respondent's Interpretation of Art. 12.1.2(a) (b) is Contrary to the VCLT

154. According to Respondent, Art. 12.1.2(a) and Art. 12.1.2(b) preclude the enforcement through ISDS of all substantive protection standards contained in Chapter 12, presumably with the notable exceptions of the two Chapter 10 provisions, Articles 10.7 and 10.8, imported into Chapter 12 and, in this sense, forming part of that Chapter. The Chapter 12 substantive provisions, however, are *all* deemed unenforceable.

155. This conclusion, so the argument says, is based on two very simple interpretive principles: (i) a plain meaning interpretation of Art. 12.1.2(b), and (ii) application of the well-recognized interpretive axiom *expressio unius est exclusio alterius* (“the *expressio* axiom”).<sup>149</sup>

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<sup>149</sup> Claimant apologizes for having to reiterate the well-known proposition that the *expressio unius est exclusio alterius* axiom is not part of the VCLT and is to be applied with extraordinary care. The reason is simple. The application of the axiom does not, as a matter of apodictic certainty, determine whether a particular set of premises was intended to be excluded, or even included.

156. A closer look at Respondent's analysis of Art. 12.1.2(a) and (b) is warranted.<sup>150</sup> It begins with the actual text itself:

**Article 12.1: Scope and Coverage**

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) financial institutions of another Party;
- (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory; and
- (c) cross-border trade in financial services.

2. Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.

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<sup>150</sup> Respondent ignores subsection (c), but it is actually helpful in understanding the comprehensive workings of subsections (a) and (b) within the various Chapter 12 substantive provisions.

(a) Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.

(b) Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.

(c) Article 11.10 (Transfers and Payments) is incorporated into and made a part of this Chapter to the extent that

cross-border trade in financial services is subject to obligations pursuant to Article 12.5.

157. Respondent concludes that Art. 12.1.2(a) obligations and protection standards constitute an exhaustive list of substantive protections in keeping with the principle of the *expressio* axiom.<sup>151</sup> Hence, so the argument says, the Section B (Investor-State Dispute Settlement) provision of Chapter 10 (Investment) applies to Financial Services investors but “solely” with respect to the four provisions in Art. 12.1.2(a) and (b): namely, Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and/or 10.14 (Special Formalities and Information Requirements).

158. Respondent correctly notes that only four provisions from Chapter 10 are incorporated into Chapter 12. Claimant agrees and merely add that of those four provisions, only two (Articles 10.7 and 10.8) are treatment protection standards that create an obligation on the contract State Parties that provides investors with a corresponding right. Articles 10.12 (Denial of Benefits) and 10.14

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<sup>151</sup> *Id.* ¶¶ 307-308.

(Special Formalities and Information Requirements) are obligations that investors must meet and rights that the contracting Parties hold.

159. Respondent, however, takes its analysis one step farther. While certainly Respondent would be correct in concluding that the only substantive provisions *incorporated from Chapter 10 (Investment) into Chapter 12 (Financial Services) are the four that are explicitly referenced in Art. 12.1.2(a) and (b)*, it does not follow of necessity that the incorporation of these four provisions voids the enforceability of all Chapter 12 treatment protection standards, and other substantive provisions.

160. Put simply, Art. 12.1.2 (a) and (b) certainly limit the substantive protections *imported from Chapter 10 (Investment) and incorporated into Chapter 12 (Financial Services)*. But Respondent reads the word “*solely*”<sup>152</sup> as expressed in Art. 12.1.2(b) as having the “spill-over” effect of voiding and qualifying application and enforcement of the substantive protection standards contained in Chapter 12, most notably Articles 12.2 (National Treatment) and 12.3 (MFN).

161. Article 12.1.2(a) and (b) do not modify, eviscerate, or otherwise qualify *any* of the

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<sup>152</sup> (emphasis supplied).



substantive protection standards contained in Chapter 12. These provisions are self-standing within the purview of Chapter 12 and cannot be treated as if they were Chapter 10 protection standards that have been excluded. They have not been modified, let alone rendered unenforceable.

162. Article 12.1.2(b) cannot be construed as divesting Financial Services investors of enforceable substantive protection standards forming part of Chapter 12. Article 12.1.2(b) does not modify, eviscerate, or otherwise qualify Art. 12.2 (National Treatment) or Art. 12.3 (MFN).<sup>153</sup>

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<sup>153</sup> See, e.g., *id.* ¶¶ 302-304, (arguing that “the provisions of Chapter 10 thus apply ‘only to the extent’ that they are expressly incorporated into Chapter 12. *This means that the dispute settlement mechanism of Chapter 10 applies only to certain, expressly defined claims, which are identified as follows in Article 12.1.2(b)* [citation omitted]”), ¶ 305 providing:

Article 12.1.2(b) must be interpreted in accordance with the rule of treaty interpretation under customary international law which is codified in Article 31.1 of the Vienna Convention on the Law of Treaties. Pursuant to such rule, a treaty must be interpreted ‘in good faith and in accordance with the ordinary meaning to be given to [its] terms.’ [citation omitted] Because Article 12.1.2(b) includes a closed set of claims that may be submitted to arbitration under Chapter 12 (as denoted by the term ‘solely’), it follows that claims that are *not* included in

163. Article 12.1.2(b) limits the number of substantive protection standards that are imported from Chapter 10 to Chapter 12 for which the Chapter 10 dispute resolution procedural rights are available. Article 12.1.2(b) does not provide that Financial Services investors cannot enforce Chapter 12 substantive rights, including Articles 12.2 (National Treatment) and 12.3 (MFN) pursuant to Section B. Indeed, the textual language of Art. 12.1.2(b) is plain enough.

164. Article 12.1.2(b) does not contain *any* language referencing a limitation on Chapter 12 substantive protection standards. This Article expressly limits only the Chapter 10 (Investment) provisions imported into Chapter 12 and enforceable pursuant to the Chapter 10 dispute mechanism that were not present in Chapter 12. There is no normative foundation for construing Art. 12.1.2(b) as a limitation to the scope or application of Art. 12.3 (MFN). The article does not reference Art. 12.3 (MFN).

165. There is no interpretive or policy basis pursuant to which Art. 12.1.2(b) divests the entire

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this list may not be submitted to arbitration. This is consistent with the related and well-established principle of *expressio unius est exclusio alterius* (i.e., the expression of one thing implies the exclusion of another). [citation omitted]

universe of Financial Services investors from Art. 12.2 (National Treatment) and 12.3 (MFN) provisions. These substantive provisions are in Chapter 12 for one single reason: the protection of Financial Services investors and their investments.

166. Article 12.1.2(b) is not a basis for credibly asserting that the Art. 12.3 (MFN) provision is restricted and, therefore, somehow cannot import a five-year limitations period from Article 11(5) of the Colombia-Switzerland BIT because doing so would do violence to the Contracting Parties' agreement to arbitrate Art. 10.7 (Expropriation and Compensation) or Art. 12.2 (National Treatment).

167. Chapter 12 provides Financial Services investors with a wide and generous panoply of substantive *and* procedural rights.<sup>154</sup> All of these provisions need to be accorded meaning, textual relevance, and enforcement.

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<sup>154</sup> See *e.g.*, Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred Third Session Congress, First Session (September 28, 1993) at 35, 45, attached as Exhibit C-0032. In the same vein, the award in *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA), (Award) (September 18, 2009), explained that NAFTA provided investors substantive and procedural rights analogous to the rights granted by third states under public international law.

168. Importing a five-year limitations period from the Colombia-Switzerland BIT amply comports with the plain meaning and unrestricted language of Art. 12.3 (MFN), as well as with the vast gamut of obligations and rights contained in Chapter 12 that run in favor of Financial Services investors.

169. Respondent's interpretive use of Art. 12.1.2(b) to limit the scope and application of Articles 12.2 (National Treatment) and 12.3 (MFN) and obligations imported from Chapter 10 turns on its head the longstanding interpretive canon commanding that every treaty provision must be construed as having meaning and purpose. Respondent's approach to Chapter 12 is to assume that Financial Services investors are to be treated in the abstract and beyond the context of Chapter 12, as if such investors were placed in Chapter 10 (Investment) subject only to two enforceable protection standards: Articles 10.7 (Expropriation and Compensation) and 10.8 (Transfers). Such simply is not the case, in part, because the structure of the TPA is not that of a BIT.

170. The consequences of this construction leads both to "manifestly absurd" and "unreasonable" results that the Parties neither intended nor could ever have imagined.

171. Respondent's logic represents a methodology to treaty interpretation that universally has been disavowed. Helpful in this regard is the Tribunal's reasoning and observations in the *Eureko v. Poland* 2005 Partial Award.<sup>155</sup> The Tribunal noted:

248. [...] It is cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.

172. The purpose of Art. 12.1.2(a), and (b) is to supplement the Chapter 12 (Financial Services) protection standard rubric in favor of Financial Services investors. It does so by contributing the Chapter 10 Section B ISDS provision, together with the four referenced substantive provisions that otherwise are not part of Chapter 12. The importation of these provisions

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<sup>155</sup> *Eureko BV v Poland*, Partial Award and Dissenting Opinion, IIC 98 (2005), 19th August 2005, Ad Hoc Tribunal (UNCITRAL) CL-0169.

further balances the rights-obligations ratio between Financial Services investors and the contracting Parties. This contribution to Chapter 12 is intended to broaden the entire gamut of the Chapter 12 substantive provisions. The purpose of these substantive provisions is to protect Financial Services investors and investments, while also bolstering host-State rights.

173. Respondent’s exegesis does not explain how, based upon the literal text of Art. 12.1.2(b), the scope of Art. 12.3 (MFN) is directly and literally qualified. Instead, Respondent draws on the principle of *expressio* axiom and concludes that both Articles 12.2 (National Treatment) and 12.3 (MFN) are in effect redundancies that have no conceptual value or practical application.<sup>156</sup>

174. Based on this approach Respondent further tries to argue that Claimant “disingenuously” somehow has set out to mislead this Tribunal by suggesting that the reference to Chapter 10 in Art. 12.1.2(b) is significant.<sup>157</sup> Respondent then substantiates its claim by citing to an incomplete sentence (a subordinate clause)

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<sup>156</sup> Respondent’s Counter memorial on Jurisdiction ¶¶ 302-304.

<sup>157</sup> As here noted immediately above, Claimant does contend that adding four additional substantive protection standards from Chapter 10 (Investment) to Chapter 12 (Financial Services) is very significant. Claimant also opines that incorporating the Chapter 10 Section B ISDS provision to Chapter 12 (Financial Services) is equally meaningful.

and arguing that Claimant embarked to suggest “that the entirety of Chapter 10 was incorporated by reference into Chapter 12.”<sup>158</sup> Respondent further offers the unremarkable proposition that “as already explained, Art. 12.1.2 of the TPA renders it unequivocally clear that Chapter 10 is *not* incorporated wholesale into Chapter 12, and that the provisions of Chapter 10 apply ‘only to the extent’ that they are expressly incorporated.” (emphasis in original).<sup>159</sup>

175. In this very same vein, Respondent holds fast to this approach and states that “once again, disingenuously – [Claimant] fails to elude to Art. 12.1.2(a), which explicitly identifies the provisions of other chapters that *are* incorporated by reference into Chapter 12[.]”<sup>160</sup> The entire line of thinking is somewhat quizzical and odd. But it must be addressed.

176. Notably, Respondent offers absolutely no VCLT Articles 31 and 32 analysis of Chapter 12 at all, let alone one that necessarily leads to rational and workable conclusions that would provide significance to most provisions contained in

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<sup>158</sup> Counter Memorial on Jurisdiction at ¶ 313.

<sup>159</sup> *Id.*

<sup>160</sup> See Respondent’s Counter Memorial on Jurisdiction ¶ 315, stating “*but -once again, disingenuously-....*” (emphasis supplied).

a Chapter that purports to promote and to protect cross-border investment in financial services.

**3. The Necessary Consequence of Respondent's Interpretive Analysis Renders Virtually the Entirety of Chapter 12 Ineffective**

177. Respondent's interpretation of Art. 12.1.2(a) and (b) and application of the *expressio* axiom as applying to all Chapter 12 substantive provisions renders theoretically void and practically dysfunctional virtually all substantive and procedural provisions of Chapter 12. Moreover, it leads to numerous structural problems, not the least of which is the unsubstantiated blanket discriminatory treatment of Financial Services investors.

**a. National Treatment is Rendered Meaningless: A Right without a Remedy**

178. Respondent's approach divests the Art. 12.2 (National Treatment) protection of any substantive content and practical application. Respondent's application of the *expressio* axiom renders national treatment in this Article a right without a remedy. Indeed, Respondent incorrectly argues that "[b]ecause Article 12.1.2(b) includes a closed set of claims that may be submitted to Arbitration under Chapter 12 (as denoted by the term 'solely'), it follows that claims that are *not*



included in this list may not be submitted to arbitration.”<sup>161</sup>

179. It therefore follows from Respondent’s reasoning that financial service investors cannot enforce the Art. 12.2 (National Treatment) provision because that right is one that is “not included in this list [Art. 12.1.2(b)].”<sup>162</sup> Instead of being included in Art. 12.1.2(b), Art. 12.2 (National Treatment) is in Chapter 12, and thus rendered unenforceable and ineffective.

180. By interpreting the word “solely” as applying not just to substantive provisions asserted in Chapter 10, *but also* to those provisions contained in Chapter 12, the Chapter 12 substantive protection standards are rendered meaningless. Neither directly, nor under some yet unarticulated derivative standing theory that is not provided for in Chapter 12, Financial Services investors are left without recourse for compensatory damages arising from national treatment protection standard violations.

181. The lack of internal consistency contained in this proposition is rendered all the more disconcerting when considered in the context of the TPA’s Chapter 12 fundamental objective:

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<sup>161</sup> Respondent’s Counter Memorial on Jurisdiction¶ 305.

<sup>162</sup> *Id.*

promoting and protecting cross-border investment in the Financial Services sector.

182. Respondent's construction of "solely" in Art. 12.1.2(b) necessarily compels the interpreter to conclude that neither the U.S. nor Colombia intended for the Art. 12.2 (National Treatment) provision to apply to Financial Services investors because national treatment is simply "not included in this list [Art. 12.1.2(b)]."<sup>163</sup>

183. As shall be described below, writings contemporaneous with the negotiations of the TPA's predecessor template, the North American Free Trade Agreement ("NAFTA"), and that agreement's Financial Services' national treatment and MFN provisions, establish beyond cavil that the national treatment and MFN provisions constituted the very core of the NAFTA's Chapter 14 (Financial Services).

184. Testimony before the Congress of the United States by government representatives of the principal Financial Services agencies and departments all testified that enforceable national treatment and MFN treatment protection standards are central features of the objectives and

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<sup>163</sup> *Id.*

workings of the NAFTA's Chapter 14 (Financial Services).<sup>164</sup>

185. The NAFTA's lead negotiator similarly testifies in this proceeding that the objective and intent of the NAFTA's Chapter 14 (Financial Services) was to provide Financial Services investors with enforceable national treatment and MFN treatment protection rights.<sup>165</sup>

**b. MFN is Rendered Meaningless: A Right without a Remedy**

186. Respondent's interpretive theory divests the Art. 12.3 (Most-Favored-Nation) protection of any content and practical application. As with Art. 12.2 (National Treatment), this reading leads to an MFN right without a remedy.

187. Respondent argues that the Art. 12.3 (Most-Favored-Nation) provision cannot be used to import any provision from other treaties, and specifically the five-year limitations period from the Colombia-Switzerland BIT. Respondent asserts that the word "solely" in Art. 12.1.2(b), applies to more than just Chapter 10 provisions and serves to eliminate Chapter 12 substantive standards and to exclude their enforceability. Respondent is

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<sup>164</sup> See C-0032 Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, p. 108-109.

<sup>165</sup> See ¶¶ 370, 373, 376, and 379.

emphatic on this point, which colors its entire Art. 12.3 (MFN) analysis:

332. The incorporation of the dispute resolution mechanism through Chapter 12 MFN Clause would be contrary to the express terms of the TPA. As noted earlier, Article 12.1.2(b) of the TPA expressly and exhaustively lists the ‘sole[]’ set of claims that can be submitted to investor-State dispute settlement under the TPA, namely: ‘Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and 10.14 (Special Formalities and Information Requirements).’<sup>166</sup>

333. The Chapter 12 MFN Clause cannot be relied upon to negate the facial language of Article 12.1.2(b) or to subvert the common intention and express will of Colombia and the

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<sup>166</sup> *Supra*, Respondent’s Counter Memorial on Jurisdiction¶ 332.

Respondent fails to articulate that the four provisions from Chapter 10 (Investment) mentioned in 12.1.2(b) were imported into Chapter 12 (Financial Services) for one simple reason; they were absent from Chapter 12. They were intended to supplement Financial Services investor protection while providing the contracting States with two sets of rights concerning denial of benefits and information requirements.

United States to limit the category of claims that may be submitted to arbitration. Allowing Claimant to rely upon the Chapter 12 MFN Clause to bring claims for alleged breaches of protections that are not listed in 12.1.2(b) would – contrary to well-established principles of treaty interpretation -- deprive that provision of *effet utile*.<sup>167</sup>

188. Plain and simply, Respondent interprets the term “solely” in Art. 12.1.2(b) as a limitation to the direct enforcement of *both* Chapter 10 provisions beyond the four that are incorporated into Chapter 12, *but also* as applying to all Chapter 12 substantive rights. This interpretation has the effect of depriving Financial Services investors from any Art. 12.3 (MFN) protection.

189. Respondent’s interpretation of Art. 12.1.2(b) cannot account for the practical workings of Art. 12.3 (MFN). It relegates the protection standard to merely a duplicative provision contained in two Chapters, 10 and 12, that has not effect or practical workings.

190. Respondent’s analysis with respect to the scope of Art. 12.3 (MFN) additionally fails because it assumes that the plain language of the

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<sup>167</sup> *Id.* ¶ 333. (citations omitted).

Art. 10.4 (MFN) and that of Art. 12.3 (MFN) is the same and therefore the Chapter 10 (MFN) restrictive Footnote 2 is incorporated, “with limits,”<sup>168</sup> into Chapter 12.

191. Respondent concludes that allowing Art. 12.3 (MFN) to import a five-year term from the Colombia-Switzerland BIT would render meaningless Footnote 2 of Art. 10.4.

192. Respondent’s assertions on this point compels citation in its entirety:

Claimant’s interpretation likewise ignores the context of the treaty, including the Chapter 10 MFN Footnote ..., the Chapter 10 MFN Footnote prevents the Chapter 10 MFN Clause from being used to import dispute resolution provisions from other treaties [citation omitted] As a result, Section B of Chapter 10 (the dispute resolution section) cannot be altered by reference to others treaties. In invoking Chapter 12 of the TPA, Claimant is relying on Section B of Chapter 10 (which is incorporated, with limits, into Chapter 12). To endorse Claimant[’s] attempt to create consent using the Chapter 12 MFN Clause would thus also be to

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<sup>168</sup> *Id.* n. 706.

deprive the Chapter 10 MFN Footnote of *effect utile*.<sup>169</sup>

193. The Art. 10.4 (Investment) MFN provision contains limiting qualifying language that simply is not found in its Art. 12.3 (Financial Services) MFN counterpart. Article 10.4(1)(2) reads:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in territory of investors of any other Party or of any non-Party *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.* [citing to Footnote 2, the restrictive qualifying language providing:

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<sup>169</sup> *Id.*

*For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.]*

(emphasis supplied).

194. Article 12.3.1 (MFN) is textually significantly broader. Much more importantly, at least for purposes of the present analysis, it *simply does not* contain the restrictive language expressed in Art. 10.4 (1)(2). Citation and analysis are necessary:

1. Each Party shall *accord to investors* of another Party, financial institutions of another Party, *investments of investors* in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than it accords to the *investors*, financial institutions, *investments of investors* in financial institutions, and *cross-border financial service* suppliers of



any other Party or of a non-Party, in like circumstances.

(emphasis supplied).

195. The Art. 12.3 (MFN) provision is broader than its Investment Chapter counterpart, Art. 10.4. Significantly, the restrictive language contained in Art. 10.4, “*with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory,*” is nowhere to be found in Art. 12.3. (emphasis supplied). As further stated in another section of this writing, the treaty practice of the Parties is to state expressly and in writing any modification or restriction to a right or obligation. That practice was followed and applied to the drafting and workings of the TPA.

196. Notably, Footnote 2, qualifying Art. 10.4, the MFN provision of the Investment Chapter, makes clear that the word “treatment” is “with respect to” the qualifying language pertaining to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” as that language is enunciated in paragraphs 1 and 2 of Art. 10.4. This very language is not at all present in Art. 12.3 (MFN).

197. It, therefore, necessarily follows that Footnote 2 is limited to (i) the scope of the language

that it qualifies, and (ii) the *types* of investments covered in Chapter 10.

198. The “treatment” scope of Art. 12.3 (MFN) attaches to the investment of investors in “financial institutions” of another Party, “financial institutions,” and “cross-border financial services suppliers of another Party.” Footnote 2 of Article 10.4 is meant to restrict a different type of investment in a context that is not transferable to the express language contained in Art. 12.3.1.

199. A textual analysis would proscribe the incorporation of Art. 10.4 (MFN) Footnote 2 into Chapter 12. Here the plain meaning and literal language of Art. 12.1.2 is helpful. This subsection provides that Chapter 10 propositions apply to Chapter 12 “only to the extent that such Chapters or Articles of such Chapters are incorporated into this [12] Chapter.”

200. Consonant with VCLT Articles 31 and 32, Art. 12.1.2(b) only incorporates Articles 10.7, 10.8, 10.12, and 10.14 from Chapter 10. It obviously does not incorporate Art. 10.4 (MFN), let alone Footnote 2, the restrictive qualifying language limiting the scope of Art. 10.4.

201. For the sake of completeness and absolute transparency, it must be noted yet again that Art. 12.1.2(b) does incorporate Section B (Investor-State Dispute Settlement) of Chapter 10

(Investment). Article 10.4 (MFN), however, does not form part of Section B of Chapter 10.

202. Finally, even if somehow these textually-based premises were incorrect, and in fact somehow Art. 10.4 and its corresponding qualifying restrictive language in the form of Footnote 2 found their way and spawned into Chapter 12, a direct and explicit conflict between Art. 10.4 Footnote 2 and really every substantive provision of Chapter 12, but certainly with respect to Art. 12.3 (MFN), would arise.

203. Article 10.2(1) lucidly provides that “[i]n the event of any inconsistency between this Chapter and another Chapter, *the other Chapter shall prevail* to the extent of the inconsistency.” (emphasis supplied).

204. Put simply, the limiting language that Footnote 2 serves to clarify and to render more certain is not present textually and conceptually can play no part in Chapter 12:

2. For greater certainty, treatment ‘*with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*’ referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in

international investment treaties or trade agreements.

(emphasis supplied).

205. Similarly, the interpretation of Section B (Investor-State Dispute Settlement) of Chapter 10 into Chapter 12 can be modified to include more favorable treatment of an existing right by increasing the limitations period from three years to five. Here as well, it is less than clear or coherent how Respondent concludes that enhancing a limitations period from three to five years constitutes the creation of a new right rather than the interpretation of a more favorable existing term.

206. Respondent spills considerable ink on the dangers of carving out of Art. 10.4 (MFN) Footnote 2 its *effet utile*.<sup>170</sup> No comparable effort, however, is exercised in assessing the effects of Respondent's interpretation of the term "solely" in Art. 12.1.2(b) on effectiveness of Articles 12.2 (National Treatment) and 12.3 (MFN), as well as that of all other substantive provisions comprising Chapter 12 (Financial Services).

**c. Respondent's Approach is  
Tantamount to Carving out of the  
TPA Chapter 12 and Treating  
Financial Services Investors as**

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<sup>170</sup> *Id.*

## Chapter 10 Investors but with Only Two Enforceable Rights

207. In fact, in the entirety of Respondent's lengthy submission, there is no *mention*, let alone analysis of Articles 12.4, 12.5, 12.6, 12.15, 12.16, 12.17, 12.8, and 12.19.<sup>171</sup>

208. Pursuant to Respondent's interpretive theory, Financial Services investors have no recourse for asserting claims based upon discriminatory and less favorable treatment than accorded to investors who are nationals of the host-State, except to the extent that the Art. 10.7.1(b) "non-discriminatory manner" expropriation stricture must be observed.

209. More generally, however the extension of the term "solely" and the application of the *expressio* axiom to the entirety of Chapter 12 merely limits the entire universe of enforceable rights to only two: Art. 10.7 (Expropriation and Compensation), and Art. 10.8 (Transfers). It wrests from Chapter 12 all practical application and theoretical content with respect to investors.

210. Article 10.14 (Special Formalities and Information Requirements) only enlarges the sphere of the signatory States' regulatory domain.

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<sup>171</sup> Article 12.10 (Exceptions) is mentioned, certainly not reconciled with Respondent's interpretive theory, on page 15 in Footnote 72.

This Article does not accord investors with even the gloss of a protection standard. Article 10.4 provides the contracting States with the right to seek information from investors and to impose “formalities [that] do not *materially impair* the protections afforded by a Party to investors of another Party and covered investments pursuant to [Chapter 10].” (emphasis supplied).<sup>172</sup>

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<sup>172</sup> See Art. 10.14 (**Special Formalities and Information Requirements**)

1. Nothing in Article 10.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not *materially impair the protections afforded by a Party to investors of another Party and are covered investments pursuant to this Chapter.*
2. Notwithstanding Articles 10.3 and 10.4, a *Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes.* The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. *Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or*

211. Provisions imposing obligations on investors are as critical as those that give rise to rights. But for purposes of this analysis it is important to secure a pristine understanding of the extent of enforceable rights that are relegated to Financial Services investors pursuant to Respondent's approach.

212. Article 10.14 (Special Formalities and Information Requirements) is simply not a standard of protection running in favor of Financial Services investors. To the contrary, it incorporates into Chapter 12 a regulatory right in favor of the State that circumscribes an obligation on Financial Services investors that did not form part of the Chapter 12 rubric.

213. The analysis concerning a second purported protection standard imported from Chapter 10 into Chapter 12 for the benefit of Chapter 12 Financial Services investors is subject to the identical analysis. Art. 10.12 (Denial of Benefits) does not provide Financial Services investors with rights, but rather with obligations. Corresponding to these obligations, it is the signatory States that are supplied with rights that expand their regulatory and legislative, sovereignty, while correspondingly reducing investor rights. This provision, Art. 10.12, provided signatory

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*disclosing information in connection with the equitable and good faith application of its law.*

(emphasis supplied).

States with a right and imposed on investors obligations that were not present in Chapter 12 (Financial Services).<sup>173</sup>

214. Consequently, Respondent's reading of the term "solely" in Art. 12.1.2(b), to all of Chapter 12 merely leaves Financial Services investors with only two enforceable protection standards: Articles

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<sup>173</sup> Article 10.12 (Denial of Benefits) reads:

1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investment.

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.



10.7 (Expropriation and Compensation), and 10.8 (Transfers).

215. Both of these provisions, particularly Art. 10.7 (Expropriation and Compensation), are legitimate investment protection standards. The analysis of the actual *enforceable* protection standards accorded to Financial Services investors under Respondent's interpretive theory, however, is incomplete without closer scrutiny of Art. 10.8 (Transfers), which is significantly qualified in scope and content.

216. Article 10.8 (Transfers) is designed to allow for transfers pertaining to covered investments to take place unfettered and with a relative degree of expediency. It is certainly a right conferred to investors that gives rise to a corresponding obligation to the signatory States. Article 10.8.4 does carve out considerable rights in favor of the signatory States that materially qualify investor transfers, and that are functionally absolute.

217. Subject to "equitable, non-discriminatory, and good faith application of its laws" predicates, signatory States are vested with absolute discretion in limiting investor rights under this Article and practically with respect to every phase of commerce. The range of exceptions is considerable.<sup>174</sup> These carve-outs are subject to the

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<sup>174</sup> Article 10.8.4 (Transfers) provides:

signatory States' discretion, which necessarily deeply tears into investor transfer rights.

218. Therefore, pursuant to Respondent's interpretive approach, Financial Services investors only are left with scarcely two enforceable protection standards: namely, Articles 10.7 (Expropriation and Compensation), and 10.8 (Transfers). This latter "right," is meaningfully curtailed and qualified pursuant to Art. 10.8.4(a)-(e). It is here important to emphasize that the qualitative extent of the discriminatory treatment applied to Financial Services investors pursuant to Respondent's analysis is extreme.

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4. Notwithstanding paragraphs 1 through 3, a Party may prevent of a transfers through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offenses;
- (d) financial reporting or recordkeeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

219. The disparity between the substantive protection rights accorded to Chapter 10 investors and Chapter 12 Financial Services counterparts is substantial and has no policy, textual, or contextual justification. It further renders Respondent's interpretation of Art. 12.1.2(b) fundamentally flawed and untenable.

220. The dysfunctional nature of applying the term "solely" in Art. 12.1.2(b) to all of Chapter 12 (Financial Services), including Art. 12.1.2(c), is highlighted by its effects on this subsection. Consonant with Respondent's approach the right that Art. 12.1.2(c) clearly grants to Financial Services investors through Art. 11.10 (Transfers and Payments) would be simply unenforceable as well. These rights (Art. 11.10) contained in Art. 12.1(c) (Scope and Coverage) under Respondent's reading would be subject to the *expressio* axiom from enforcement because Art. 11.10 (Transfers and Payments) is not listed in the immediately preceding paragraph, Art. 12.1.2(b).

221. The Art. 11.10 cross-border transfer rights are indispensable to Financial Services investors and are to be read in *pari materia* with Art. 12.5 (Cross-Border Trade) as clearly set forth in Art. 12.1.2(c) providing that Art. 11.10 (Transfers and Payments) "is subject to obligations pursuant to Article 12.5."

222. Article 12.5 (Cross-Border Trade) is pivotal to Financial Services investors and the

enforceability of this Article is paramount because, among other things, Art. 12.5.1 accords “national treatment” protection to “cross-border financial service suppliers of another Party.” Without a mechanism to enforce this right, Financial Services investors would be placed in considerable operational jeopardy.<sup>175</sup>

223. The extent to which Respondent’s construction of Art. 12.1.2(b) treats Financial Services investors of Chapter 12 less favorably than Chapter 10 investors cannot credibly be characterized as a legitimate trade or investment macroeconomic policy that the United States or

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<sup>175</sup> Article 12.5 (Cross-Border Trade) in part States

1. Each Party shall permit, under terms and conditions *that accord national treatment*, cross-border financial service suppliers of another Party to supply the services specified in Annex 12.5.1.
2. Each Party shall permit persons located in its territory, and its nationals wherever located, to purchase financial services from cross-border financial service suppliers of another Party located in the territory of that other Party or of any other Party. This obligation does not require a Party to permit such suppliers to do business or solicit in its territory. Each Party may define ‘doing business’ and ‘solicitation’ for purposes of this obligation, provided that those definitions are not inconsistent with paragraph 1.

(emphasis supplied).

Colombia were legitimately pursuing. Mr. Olin Wethington has testified on this disparity. He observes that “[a]lthough the NAFTA Parties recognize the importance of having a financial services chapter distinct from the general investment chapter, the parties had no intention to create an overall imbalance in benefits by treating financial services investors less favorably than the broad universe of Chapter 11 investors.”<sup>176</sup> He further testifies:

If respondent’s interpretation is adopted, the financial services sector would in comparative terms be significantly disadvantaged – an untenable result and one that I believe would have been prominently identified and disputed in the Congressional approval process. It is inconceivable to me that Congress would have ratified a treaty that did not provide for the enforceability of treatment protection standards favored by constituency comprising the entire universe of financial services investors placing high priority on access to the Mexican market.

Respondent’s interpretation would deny investor-State dispute settlement

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<sup>176</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶ 58.

protections to financial service investors not only for violation of national treatment and MFN, but also for *all* other obligations in the Financial Services Chapter – an unimaginable result given the U.S. negotiating priorities and understandings.<sup>177</sup>

**d. Respondent Renders Art. 12.4 (Market Access for Financial Institutions) Meaningless**

224. A central objective of the TPA was to ensure from both trade and investment perspectives market access and financial institution establishment rights. Reciprocity of access and market condition are critical features that the TPA sought to create, protect, and enhance.<sup>178</sup>

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<sup>177</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶¶ 59-60.

<sup>178</sup> See the TPA's preamble. Also helpful in this regard is the NAFTA's Art. 102 (Objectives), which provides:

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

(a) eliminate barriers to trade in, and facilitate the cross-border

225. Reading Art. 12.4 out of Art. 12.1.2(b) would in effect divest Financial Services investors from enforcing a pivotal right of the entire TPA, let alone Chapter 12. A Party's non-compliance with *any* of the obligations set forth in Art. 12.4 would materially hamper, if not altogether eliminate, the viability of Financial Services offered by investors of another Party. Pursuant to Respondent's construction of the Chapter 12 scope provision, a Financial Services investor cannot enforce its rights to be free from limitations imposed on:

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movement of, goods and services between the territories of the Parties;

(b) promote conditions of fair competition and the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

(e) create effective procedures for the implementation and application of this Agreement, or its joint administration and for the resolution of disputes; and

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

(i) the number of financial institutions whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirements of an economic needs test,

(ii) the total value of financial service transactions or assets in the form of numerical quotas or the requirement of an economic needs test,

(iii) the total number of financial service operations or the total quantity of financial services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test, [footnote number 1 to this subsection provides; ‘this clause does not cover measures of a Party that limit inputs for the supply of financial services’],<sup>179</sup> or

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<sup>179</sup> Consonant with the demonstrable treaty practice of both the United States and Colombia, any restrictions to the scope of an obligation or right is expressly stated. Art. 12.4 (iii) is no exception.



(iv) the total number of natural persons that may be employed in a particular financial service sector or that a financial institution may employ and who are necessary for, and directly related to, the supply of a specific financial service in the form of numerical quotas or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a financial institution may supply a service.<sup>180</sup>

226. An interpretation of Art. 12.1.2(b) that forecloses enforcement of Art. 12.4 to Financial Services investors is contrary to the most foundational aspirations of the TPA.<sup>181</sup>

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<sup>180</sup> Article 12.4 (Market Access for Financial Institutions).

<sup>181</sup> The importance of having meaningfully enforceable rights that would compensate a claimant suffering damages and impose a sanction on the non-performing Party was recognized by the Republic of Colombia's former President, Álvaro Uribe Vélez, in a document of public record titled: "Trade Protection Agreement Colombia-United States, Summary" (*Tratado de Libre Comercio Colombia-Estados Unidos, Resumen*). In that document, President Uribe distinguishes the TPA from the "ATPDA" (Andean Trade Promotion and Drug Eradication Act (2002)), precisely

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because of the TPA's dispute resolution mechanisms. He specifically speaks to the benefits derived from an agreement where an injured Party may be compensated and the offending Party sanctioned.

The relevant language can be found on page 9, which in pertinent reads:

Although countries execute commercial agreements with the clear intent of complying with the obligations imposed by such agreements, and of reaping the agreements' benefits, during the process of implementation and development differences concerning the interpretation and application of the Treaty arise. It is for this reason that the Chapter on Dispute Settlements sets forth the appropriate procedures that are to be followed in order to settle problems that may arise (mechanism for settlement of disputes) .... If after the concept of the panel the differences persist, there exist alternatives for compensating prejudice and sanctioning the non-performing Party. These mechanisms are essential in order to guarantee juridic certainty that what has been agreed to shall be complied with. This is one of the reasons why the TPA is much better than a mere framework like the Andean Trade Promotion and Drug Eradication Act (2002) unilateral preferences do not have mechanisms for accountability for performance of what has been agreed to, which the TPA certainly does have.

The Spanish language original states:

*Si bien los países firman acuerdos comerciales con la clara intención de cumplir con las*

**e. Article 12.11 (Transparency and Administration of Certain Measures) is of No Force and Effect Pursuant to Respondent's Interpretive Theory**

227. Another substantive core provision of the TPA, comparable to market access, is the Art. 12.11 transparency provision. Foremost to Financial Services investors is regulatory transparency. Transparency is endemic to every substantive protection standard in Chapter 12. It is at the root of treatment no less favorable than

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*obligaciones adquiridas y de beneficiarse de lo acordado, en los procesos de implementación y desarrollo surgen diferencias de interpretación y aplicación del tratado. Por tal razón, el capítulo de Solución de Controversias define los procedimientos que se deben seguir para solucionar los problemas que se presenten (mecanismo de solución de controversias).... Si aún después del concepto del panel persisten las diferencias existen alternativas de compensación al perjudicado y de sanción al que incumple. Estos mecanismos son fundamentales para garantizar la seguridad jurídica de que lo que se acuerda se cumple y es una de las razones por las cuales un TLC es mucho mejor que un esquema tipo ATPDEA [ley de preferencias arancelarias andinas y erradicación de la droga]. Las preferencias unilaterales no tienen mecanismos de exigibilidad de lo acordado como sí lo tiene el TLC.*

(emphasis in Spanish original supplied) CL-0336-A

that accorded to a Party's investors. In this same vein, transparency constitutes an essential element of non-discriminatory practice, particularly concerning the regulatory environment of Financial Services investments.

228. Respondent's interpretation of Art. 12.1.2(b) as providing Financial Services investors with only two enforceable protection standards imported from Chapter 10, carves out Art. 12.11 (Transparency and Administration of Certain Matters) as an enforceable right.

229. In addition to providing the signatory States with a fulsome transparency requirement, Art. 12.11 is an interactive provision. It contemplates transparency and equity in processing an *investor's* application concerning the supply of financial services.<sup>182</sup> Any deficit arising

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<sup>182</sup> In this regard Art. 12.11(10) is relevant:

10. A Party's regulatory authority shall make an administrative decision on a completed application of an *investor* in a financial institution, a financial institution, or a cross-border financial service supplier of another Party relating to the supply of a financial service within 120 days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until all relevant hearings are held and all necessary information is received. Where it is not practicable for a decision to be made within 120 days, the regulatory authority

from lack of transparency, discriminatory treatment, or material irregularities in connection with an investor's application would jeopardize the investment and leave an investor without *any* recourse.

230. As Colombia's President Uribe aptly observed in the *Colombia-US TPA Summary*, material obligations may not be observed as a consequence of treaty interpretation or otherwise, thus reducing a treaty to the status of a mere agreement to agree.<sup>183</sup>

231. An interpretation of Art. 12.1.2(b) that renders Art. 12.11 (Transparency and Administration of Certain Matters) unenforceable, is simply fundamentally flawed and untenable.

**f. Article 12.10 (Exceptions) is of Limited Force and Effect Pursuant to Respondent's Interpretation of Art. 12.1.2(b)**

232. Respondent's interpretive approach does not comport with the workings of Art. 12.10 (Exceptions). The entirety of this provision supplies signatory States with considerable

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shall notify the applicant without undue delay and shall endeavor to make the decision within a reasonable time thereafter.

(emphasis supplied).

<sup>183</sup> CL-0336-A.

regulatory sovereignty. Regulatory agencies are protected and authorized to undertake practically whatsoever measure is necessary in the broad “pursuit of monetary and related credit or exchange rate policies.”<sup>184</sup>

233. Indeed, even with respect to Articles 10.8 (Transfers) and 11.10 (Transfers and Payments) State regulatory authorities still are authorized “[to] prevent or limit transfers by financial institution or cross-border financial service supplier,” so long as such a measure relates “to [the] maintenance of the safety, soundness, integrity, or financial

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<sup>184</sup> Art. 12.10.2 in its entirety reads:

2. Nothing in this Chapter [Financial Services] or Chapter Ten (Investment), Fourteen (Telecommunications) or Fifteen (Electronic-Commerce), including specifically Articles 14.16 (Relationship to Other Chapters), and 11.1 (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by a covered investment, *applies to non-discriminatory* measures of general application taken by any public entity in pursuit of monetary and related credit or exchange rate policies. This paragraph shall not affect a Party’s obligations under Article 10.9 (Performance Requirements) with respect to measures covered by Chapter Ten (Investment) or under Article 10.8 (Transfers) or 11.10 (Transfers and Payments).

(emphasis supplied).

responsibility of financial institutions or cross-border financial service suppliers.” In fact, Art. 12.10.3 further provides that it “does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.”

234. The almost absolute prudential measures exception provided for in Art. 12.10 is inconsistent with an interpretive theory that only grants financial service investors in Chapter 12 with two enforceable treatment standards of protection, one of which is meaningfully qualified. The vast protection that Art. 12.10 (Exceptions) grants to the Parties’ regulatory agencies is not compatible with an interpretive theory of Art. 12.1.2(b) that leaves Financial Services investors with diminished recourse against the exercise of a Party’s regulatory sovereignty in a vastly regulated economic sector.

235. The fulsome depth and scope of the prudential measures exceptions set forth in Art. 12.10 makes greater sense in the context of an interpretation that renders Chapter 12 substantive provisions enforceable. In this very connection, the two non-circumvention provisions contained in Art. 12.10 (Exceptions) can be best underscored and their purpose better defined.

236. Notably, Art. 12.10(1) qualifies somewhat the exception by noting that “[w]here such measures do not conform with the provisions of this Agreement referred to in this paragraph,

*they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions.*" (emphasis supplied). Although somewhat general and scant, this provision attempts to reinforce all of an investor's substantive rights under Chapter 12, as well as Chapters 10, 14, 15, and 11.

237. In this same vein, Art. 12.10(4) also sets forth a non-circumvention provision. It is much more substantive and particular than its subsection (1) counterpart, although it is contained in a subsection that further broadens the Parties' regulatory sovereignty:

4. For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, *subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial*



*institutions or cross-border trade in financial services.*

(emphasis supplied).

238. This second non-circumvention provision set forth in Art. 12.10(4) explicitly references “arbitrary” and “unjustifiable discrimination” as rights limiting any expression of legislative or regulatory sovereignty with respect to the prudential measures exceptions. Again, this carve-out is much more meaningful, if not altogether *only* meaningful, in the context of an interpretation of Art. 12.1.2(b) that renders Chapter 12 substantive protection standards enforceable. The explicit reference to “arbitrary or unjustifiable discrimination” would trigger enforcement of Art. 12.2 (National Treatment) on the part of an investor and is suggestive of an international minimum standard of protection.

239. Respondent’s interpretation provides for no such possibility.

**g. Respondent’s Interpretation of Art. 12.1.2(b) Does Not Reconcile the Unavailability of Art. 12.18 (Dispute Settlement) to Financial Services Investors**

240. Respondent’s interpretation of Art. 12.1.2(b) does not reconcile the unavailability of Art. 12.18 (Dispute Settlement) to investors. It is not

clear from Respondent's Counter Memorial whether in fact Respondent is contending that Financial Services investors only may assert claims for (i) qualified transfers and (ii) expropriation. Consonant with this approach, all other Chapter 12 substantive provisions are rendered unenforceable.

241. If so, Respondent presents an interpretive approach that does not reconcile the unavailability of dispute settlement pursuant to Art. 12.18 to investors. If in fact Respondent admits that Art. 12.18 only provides for government-to-government dispute settlement and does not contemplate a mechanism pursuant to which individual investors *derivatively* may assert claims through its Party signatory against another Party, then, of course, Respondent asks this Tribunal to accept the proposition that Financial Services investors only have enforceable rights with respect to qualified transfer rights and expropriation.

242. As a direct consequence of this premise it necessarily must follow that the remaining treatment standards of protection and substantive provisions forming part of Chapter 12 are meant for enforcement through the Art. 12.18 (Dispute Settlement) mechanism that is applicable only to government-to-government contentions. Moreover, such government-to-government arbitrations are not and cannot be intended to serve as procedures through which individual

investors may assert derivative claims for compensatory damages.

243. Claimant advances that indeed Art. 12.18 only is intended for government-to-government arbitrations. Furthermore, Claimant notes that such government-to-government arbitral proceedings are not, and cannot be understood as providing individual investors with standing to enforce the treatment protection standards and other substantive provisions (i) contained in Chapter 12 (Financial Services) or (ii) those imported into Chapter 12 from other TPA Chapters. Even a surface VCLT analysis would suggest as much. The term “investor” is not even mentioned in Art. 12.18 (Dispute Settlement).

244. Therefore, although it is difficult to discern with certainty because Respondent only mentions one article pertaining to Chapter 12 in the entirety of its considerable briefing, Respondent’s reading of Art. 12.1.2(b) seems to invite this Tribunal and any interpreter to adopt the position that Chapter 12 Financial Services investors only may enforce two protection standards imported from Chapter 10 and none of the protection standards and substantive provisions contained in Chapter 12.

245. This analysis would render inexplicable the reason(s) why Chapter 12 would provide for elaborate government-to-government arbitral recourse, while leaving Financial Services

investors only with the very limited ability to enforce two rights.

246. The most obvious alternative approach is equally unsatisfactory. Similarly unavailing would be a “broader” understanding of Respondent’s approach as construing Art. 12.18 as a mechanism that provides Financial Services investors with derivative standing to enforce their Chapter 12 substantive provisions and treatment standards of protection that otherwise are unavailable. Again, it is critical to note that under Respondent’s theory none of the Chapter 12 treatment protection standards or other substantive provisions are enforceable to claim pecuniary damages.

247. To the extent that Respondent seeks to temper its extreme view of the Financial Services investors’ enforcement rights by adopting a derivative standing approach to Art. 12.18 (Dispute Settlement), this approach also fails.

248. Article 12.18 does not provide a methodology for Financial Services investors to press claims arising from the violation of Chapter 12 treatment protection standards through government-to-government arbitration. The Art. 12.18 rubric simply does not accord Financial Services investors with derivative standing to assert *any* claims.

249. Article 12.18 lacks *textual* support for a derivative standing theory. It is equally lacking in any treaty *contextual* basis for this interpretation. In fact, the contrary is true.

250. Article 12.18 was intended to address macro technical disputes concerning the maintenance and development at a government-to-government level of the workings of Chapter 12. The Art. 12.18 dispute settlement framework, when understood in the context of other provisions relevant to its implementation, makes clear that the claims that it is designed to assert are very distinct from those that conventionally are aired in the context of ISDS. The government-to-government claims are premised on macro level relief going forward on a prospective basis. This structural feature contrasts with ISDS claims bottomed on seeking relief for past violations in the form of compensatory damages.

251. By way of example, Art. 12.16 (Financial Services Committee), based upon its plain meaning, cannot serve as a basis for redressing any wrong that a financial service investor could have suffered. The term “investor” is nowhere found in that Article. It is not even mentioned in the Annex to this provision. The Annex sets forth macroeconomic and regulatory policies that the *Parties* are to implement. Most, if not all, of the Annex is concerned with the regulation of financial services products such as retirement funds and the establishment of bank

branches. Nowhere is investor or investment protection referenced.

252. Instead, Art. 12.16 (Financial Services Committee) states that the Financial Services Committee shall: “(a) supervise the implementation of this Chapter and its further elaboration; (b) consider issues regarding financial services that are referred to it by a Party; and (c) participate in the dispute settlement procedures [government-to-government arbitration preclusive of investor-State arbitration] in accordance with Art. 12.19.”<sup>185</sup>

253. The provision concerns the regulation of trade and financial services. It does not at all touch upon compensatory redress or protection for investors or investments.

254. Likewise, Art. 12.17 (Consultations) generously grants Parties (States) the right to consult financial services subject matter issues contained within the TPA. Significantly, however, Art. 12.17 makes no provisions for investor or investment protection.

255. Consequently, the Articles 12.16 (Financial Services) and 12.17 (Consultations) frameworks contemplate government-to-government discussions and conciliation concerning

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<sup>185</sup> See Supplemental Expert Report Mr. Olin L. Wethington ¶ 42 pointing to the NAFTA counterpart (Art. 14.12) of the NAFTA Chapter 14 Financial Services provision.

the maintenance and development of macro financial regulatory services that constitute the appropriate subject matter of discussions between States and that do not provide *any* standing for aggrieved Financial Services investors. These are macro regulatory maintenance and enhancement provisions.

256. As with Art. 12.16 (Financial Services Committee), nowhere in Art. 12.17 (Consultations) does the term “investor” appear.<sup>186</sup> The omission of this term is deliberate. The absence of the term is consistent with the Committee’s purpose, as already discussed. The term’s exclusion is correct and consonant with the provision’s objective and underlying policies.

257. Claimant’s position in this case is that the purpose of Art. 12.18 (Dispute Settlement) is a verbatim derivative of the NAFTA Art. 14.14 (Dispute Settlement), which is not designed to provide Financial Services investors with an enforcement mechanism to address a Party’s violation of a treatment protection standard.

258. In keeping with Mr. Olin Wethington’s testimony,<sup>187</sup> Art. 12.18 (Dispute Settlement) was not drafted to serve as a dispute settlement provision pursuant to which Financial Services

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<sup>186</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶¶ 42-43, providing a NAFTA counterpart analysis.

<sup>187</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶ 43.

investors would be able to redress alleged violations of national treatment and/or MFN treatment standards of protection derivatively through their respective States. There is no such language at all in any of the relevant Articles that would support such an interpretation: Articles 12.16, 12.17, and 12.18.

259. To the extent that Respondent's interpretation of Art. 12.1.2(b) suggests or otherwise provides a reasonable basis from which it may be inferred that Art. 12.18 (Dispute Settlement) would supplement or altogether supplant what otherwise would appear to be a deficit in the dispute resolution mechanism rendering all Chapter 12 treatment provision standards and substantive provisions unenforceable, such reading cannot be sustained. Furthermore, the actual textual plain language of Articles 12.2 (National Treatment), 12.3 (MFN), 12.4 (Market Access for Financial Institutions), and 12.11 (Transparency and Administration of Certain Matters), all provide in no uncertain terms that the rights are held by investors and the corresponding obligations are imposed on the contracting States.

260. Empirical data further corroborates the inadequacy of government-to-government dispute resolution as a methodology for redressing the alleged violation of investor protection standards. Pointing to Art. 12.18 (Dispute Settlement) as a procedural right that bridges a patent deficit between substantive treatment



standards of protection and enforceable rights is functionally no different than asserting that Financial Services investors have rights without remedies.

261. In the entire history of investment protection arbitration, with the clear understanding that Claims Tribunals cannot be characterized as falling under this umbrella because they explicitly provide for derivative standing to assert claims for compensatory (pecuniary) relief, there is only record of four government-to-government treaty-based investment arbitrations. Only three of which ever were concluded to Panel Report.<sup>188</sup>

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<sup>188</sup> In the Matter of an Arbitration before an Arbitral Tribunal Constituted in Accordance with Art. 7 of the Treaty between the United States of American and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993, in the UNCITRAL Arbitration Rules 1976, between the Republic of Ecuador and the United States of America, (Award) (PCA, September 29, 2012) CL-228; and Italian Republic v. the Republic of Cuba, ad hoc state-state Arbitration, Final Award (Sentence Finale) CL-0176. (January 15, 2008); and In the Matter Cross-Border Trucking Services (Secretariat File No. USA-Mex-98-2008-2001 Final Report of the Panel, NAFTA) (February 6, 2001) CL-0163. There appears to have been a fourth case filed by the Republic of Chile against the Republic of Perú that was not prosecuted in connection with the ISDS *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. the Republic of Perú*, ICSID Case No. ARB/03/4, (Award) (February 7, 2005) RL-0020.

262. Mr. Olin Wethington's testimony is illustrative on this point. Speaking in the context of the NAFTA predecessor template agreement to the TPA he testifies:

53. On personal knowledge, as the lead U.S. negotiator on financial services in the NAFTA, I can testify that it was not the intent of the United States, or of the other two NAFTA signatories, to have the NAFTA state-to-state dispute settlement mechanism adjudicate particular Financial Services investor claims. Indeed, the term 'investor' is never used in the article dealing with state-to-state dispute settlement. Thus, state-to-state arbitration is not constructed as a mechanism for settlement of individual investor claims. To reinforce this point I note that Parties are encouraged, though not required, to precede state-to-state dispute settlement with efforts at

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A review of this jurisprudence amply reflects that the government-to-government proceedings were far from derivative actions on the part of States on behalf of specific individuals asserting derivative standing through the respective States to recover compensatory damages. Indeed, the procedural configuration of these proceedings is poles apart from instances where such derivative claims are asserted, as is the case in the law of claims tribunals.

consultations. Where consultations are not successful at resolution, reporting to the NAFTA's Financial Services Committee is required. The Financial Services Committee in this context has three functions set forth in Article 1412: to supervise the implementation of the Financial Services Chapter, to consider issues regarding financial services that are referred to it by the Parties, and to participate in the dispute settlement procedures in accordance with Article 1415. Article 1415 involved consideration by the Financial Services Committee of a respondent's defense to 'prudential measures' in an investor-State dispute. However, the Committee has no additional role in an investor-State dispute, thereby reinforcing the distinction between investor-State and state-to-state.

54. Thus, the scope of application of state-to-state dispute settlement does not extend to consideration of individual investor claims. Furthermore, the consultation article (preceding state-to-state) in Article 1413(4) states that that 'nothing in this Article shall be construed to require regulatory authorities

participating in consultations under paragraph 3 to disclose information or take any action that would interfere with individual regulatory, supervisory, administrative or enforcement matters.’ I note the word ‘individual’ reinforcing that individual investor claims are outside the state-to-state dispute settlement and its related consultation process.

55. Moreover, where a measure is found to be inconsistent with the treaty the remedy is ‘suspension of benefits’ by the prevailing Party. It does not authorize the payment of monetary compensation to the prevailing Party, much less to an investor.<sup>189</sup>

263. Finally, in addition to the absence of any language in Art. 12.18 (Dispute Settlement) providing for the filing of derivative claims through States on behalf of their respective nationals, the very language of this provision unequivocally establishes that compensatory damages are not awarded in government-to-government arbitrations pursuant to Art. 12.18 (Dispute Settlement). In particular, Art. 12.18 (4) explicitly references Art.

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<sup>189</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶¶ 53-55.

21.16 (Non-Implementation-Suspension of Benefits).  
That provision reads:

1. On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any of the panel.
2. If, in its final report, the panel determines that a disputing Party has not conformed with its obligations under this Agreement or that a disputing Party's measure is causing nullification or impairment in the sense of Article 21.2, *the resolution, whenever possible shall be to eliminate the non-conformity or the nullification or impairment.*

(emphasis supplied).<sup>190</sup>

264. If Respondent agrees with Claimant that Art. 12.18 (Dispute Settlement) in no way provides for derivative actions then Respondent's interpretive theory leaves Financial Services investors unable to enforce any of the Chapter 12

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<sup>190</sup> Article 21.16 (Non-Implementation-Suspension of Benefits) provides that any monetary assessment would be "intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found."

(Financial Services) treatment standard of protection and other substantive provisions contained in that Chapter. In this regard, Respondent's interpretive theory fails to reconcile the unavailability of government-to-government arbitration and the ability of such investors to enforce only two treatment protection standards imported from Chapter 10 (Investment).

265. Under either approach, (i) extending derivative standing to Financial Services investors through Art. 12.18, or (ii) agreeing that Art. 12.18 is only designed for government-to-government claims regarding the maintenance and development of Chapter 12, Respondent's interpretive theory falls short. It leaves looming in Chapter 12 Articles 12.2 (National Treatment) and 12.3 (MFN), among others without conceptual content or practical application. This status makes no sense.

266. This construction reads into the protection standard a restriction that is nowhere present in Art. 12.3 (MFN) or at all in Art. 12.1 (Scope and Coverage), which does not reference Art. 12.3.

**h. Without Textual, Contextual or Policy Justification Financial Services Investors are Treated less Favorably than the Entire Universe of Chapter 10 (Investment) Investors**

267. Respondent's interpretation of Art. 12.1.2(b) compels an asymmetrical proposition for which there is no support in public international law or even in Colombia's own national legislation.<sup>191</sup> Pursuant to Respondent's reading of

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<sup>191</sup> Indeed, Article 13 of the Political Constitution of Colombia (1991) states that "All persons are born free and equal before the law, shall receive the same protection and treatment from the authorities, and shall enjoy the same rights, freedoms and opportunities *without any discrimination* based on sex, race, national or family origin, language, religion, political or philosophical opinion. *The State shall promote the conditions for equality to be real and effective....*"

(emphasis supplied).

To promote this concept, the National Constituent Assembly, which produced the Political Constitution of 1991, "in the report for the first debate on the subject of equality, which appears in Constitutional Gazette No. 82," stated that: "***The direct consequence of equality is the non-discrimination of persons, neither to harm them nor to favor them....***"

(emphasis supplied). See Constitutional Court judgments T-432/92, CL-0256-A and C-472/92, CL-0234-A.

With regards to equality between legal persons, the Constitutional Court itself, in its judgement SU 182/98, said the following: "It is evident that *when equality between legal persons, public or private, is protected, therefore equality between individuals of the human species is protected, since legal persons owe their existence and subsistence to humans, even in the cases in which they are created by the State, since the objective and justification of the latter is necessarily referred to the human person.*"

Art. 12.1.2(a) and (b), Financial Services investors are treated less favorably than the entire universe of all investors in any other industry sectors (i.e., infrastructure, resource extraction, technology, hospitality, etc.).

268. As a matter of formal structure all investors qualifying under Chapter 10 (Investment) are accorded substantive protection standards that are enforceable under Art. 10.4. Standing in sharp relief, Financial Services investors are accorded substantive rights in Chapter 12 that simply are not enforceable pursuant to any dispute settlement provision or under Art. 12.3 MFN practice.

269. Hence, in keeping with Respondent's own interpretive methodology, Financial Services investors are foreclosed from enforcing National Treatment and MFN standards of protection, including the enforcement of all rights with the exception of the four substantive provisions contained in Art. 12.2(b): namely, (i) Expropriation and Compensation, (ii) Transfers (excluding of course transfers and payments under Art. 11.10), (iii) Denial of Benefits, and (iv) Special Formalities and Information Requirements.

270. This consequence is contrary to the objectives of Chapter 12 as those goals are evidenced in (i) congressional testimony on the NAFTA predecessor template, (ii) contemporaneous

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(emphasis supplied).



writings with the negotiations of the NAFTA Chapter 14 (Financial Services), (iii) the Parties' treaty practice, and (iv) the factual and expert testimony of the US lead negotiator of Chapter 14 (Financial Services) of the NAFTA. In addition to disavowing all of the referenced interpretive and contextual authority, the dichotomy belies the context of Financial Sector investors.

271. Such investors are the most vulnerable class of investors because of the nature of the highly regulated environment that envelopes their investment. Because they are so exposed, Financial Services investors have been accorded Chapter 12 comprising the appropriate substantial procedural protections that would address the risk incident to this economic sector. Therefore, it would be inconsistent with this context to treat them less favorably than their Chapter 10 (Investment) counterparts.

272. As is explained in greater detail below, Articles 10.12 (Denial of Benefits), and 10.14 (Special Formalities and Information Requirements) engrafted on Financial Services investors obligations and not rights. This construction is conceptually no different than treating Financial Services investors in the abstract as if Chapter 12 simply did not exist and Financial Services investors just formed part of Chapter 10 but only having two actionable protection standards: Articles 10.7 (Expropriation and Compensation) and 10.8 (Transfers).

**i. Article 11.10 is Rendered  
Meaningless in the Context of  
Chapter 12**

273. Furthermore, Respondent's reading deprives investors of any right to enforce Art. 11.10 (Transfers and Payments). Notably, this Article forms part of Art. 12.1 (Scope and Coverage) rubric. Art. 12.1.2(c) reads:

2. Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.

...

(c) Article 11.10 (Transfers and Payments) is incorporated into and made a part of this Chapter to the extent that cross-border trade in financial services is subject to obligations pursuant to Article 12.5.<sup>192</sup>

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<sup>192</sup> Article 11.10 (Transfers and Payments) concerns the substantive right pertaining to the cross-border supply of services that is to take place unhampered and without delays. The Article provides:

274. Respondent's approach would render all transfer and payment rights relating to the cross-border supply of services unenforceable to the extent that denial of these rights or non-compliance

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1. Each Party shall permit all transfers and payments relating to the cross-border supply of services to be made freely and without delay into and out of its territory.

2. Each Party shall permit such transfers and payments relating to the cross-border supply of services to be made in a freely useable currency at the market rate of exchange prevailing on the date of transfer.

3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer or payment through the **equitable, non-discriminatory**, and **good faith application** of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options or derivatives;

(c) financial reporting or recordkeeping of transfers when necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offences; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

(emphasis supplied).

with such obligations causes an investor to suffer damages. Article 11.10.3(a)-(e) does grant each Party very specific non-prudential measure exceptions extending to five particular categories with respect to which it is generally accepted that States do and should exercise liberal regulatory and legislative sovereignty.

275. This sub-section, however, tempers the exception by containing explicit references to “the equitable, non-discriminatory, and good faith application of its laws,” in preventing or delaying a transfers or payment in connection with any of the five designated categories. Therefore, presumably investors are granted rights to fair and equitable treatment under this provision. Respondent’s interpretive analysis would foreclose the enforcement of any such rights because it simply is not one of the four expressly stated rights and obligations in Art. 12.2(b).

276. The anomalies resulting from Respondent’s interpretation of Art. 12.1.2(b) are simply too many to reconcile. Mr. Wethington offers both fact and expert witness testimony on the ramifications of Respondent’s construction of this article. Because the NAFTA was the template for the TPA, it is in this sense very much the TPA’s *travaux préparatoires*. Mr. Wethington refers to Article 1401(2), the NAFTA counterpart to Art. 12.1.2(b). This testimony speaks to context and objectives:

40. The logical and practical implications of Respondent's interpretation of Article 1401(2) should be fully appreciated -- because Respondent's interpretation would defeat the core goals and achievements of the Financial Services Chapter -- which is effective investor protection centered around national treatment, MFN, and other key protections, such as establishment of financial institutions. I recall again the Objectives Chapter of the NAFTA which requires the Parties to interpret provisions of the NAFTA in light of its stated objectives [citing to paragraph 14 of the supplemental witness statement]. Respondent's Answer on Jurisdiction, paragraphs 302-304, takes the position that investor-state dispute settlement under the Financial Services Chapter of the TPA (essentially identical language to the corresponding NAFTA provision) applies only to the 'closed-set' of provisions imported from the general Investment Chapter (and a subset of the imported provisions at that) [citation omitted]. In Respondent's words, the list is 'expressly limited'

(paragraph 302) and 'exhaustive' (paragraph 309).

41. Given its interpretation, Respondent in fact concedes that Claimant can submit a claim to investor-state arbitration for breach of the expropriation provision, Article 10.7 of the TPA -- one of the subset of provisions referenced. However, because none of the substantive provisions of the Financial Services Chapter are listed in the subset of imported provisions from the Investment Chapter, Respondent's interpretation of Article 1401(2) is that all substantive protections of the Financial Services Chapter -- all inherently not imported from the general Investment Chapter -- are not subject to investor-state arbitration under the NAFTA -- a draconian result not intended by the Parties. *I can attest specifically based on my personal knowledge as the lead US negotiator for the Financial Services Chapter that such result was not intended by the Parties.*

42. *Respondent's interpretation would eviscerate all investor enforcement for*

*Chapter 14 obligations; all Chapter 14 obligations would be without remedy. This result is not supported by reason, treaty text, or the legislative history of the NAFTA.*<sup>193</sup>

(emphasis supplied).

277. Claimant submits that the Parties consented to arbitrating claims arising from alleged violations of Art. 12.2 (National Treatment). Claimant also invites the Tribunal to consider that the Parties consented to a sufficiently expansive Art. 12.3 (MFN) so as to import more favorable standards that would enhance the scope and context of existing rights.<sup>194</sup>

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<sup>193</sup> Supplemental Expert Report Mr. Olin L. Wethington ¶¶ 40-42.

<sup>194</sup> Professors Loukas Mistelis and Jack Coe, Jr. both have opined on the construction of Art. 12.1.2(b). Professor Mistelis has noted that expanding the word “solely” in that article to limit or altogether eliminate the Chapter 12 financial services substantive provisions should be rejected. (See Supplementary Expert Report of Professor Loukas Mistelis ¶¶ 75-85.) Respondent elected to ignore Professor Mistelis’ expert opinion. We encourage, however, the Tribunal to consult it as it provides helpful analytical construct, particularly with respect to the connection between the history of MFN clauses and their contemporary practical application.

Professor Jack Coe, Jr. has provided an expert opinion report, a supplementary expert opinion report, and a declaration. In

**B. The Appropriate VCLT Analysis of Art. 12.1.2(b) Renders the Substantive Provisions Contained in Chapter 12 Enforceable and Therefore Meaningful, Including Articles 12.2 (National Treatment) and 12.3 (MFN)**

278. Claimant reads Art. 12.1.2(b) in keeping with Articles 31 and 32 of the VCLT, together with widely-accepted canons of treaty interpretation. As a predicate to the application of orthodox interpretive principles, Claimant first notes that the TPA is not a BIT. This basic distinction often is overlooked. Respondent's analysis is devoid of any such consideration.

279. The TPA by definition is more than just an investment protection treaty. Therefore, its objectives, context, structural and substantive features, are significantly different from those

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this declaration Professor Coe has noted a number of drafting irregularities and ambiguities that plague Art. 12.1.2(b). This Tribunal also should note that Respondent has not commented on Professor Coe's expert opinion. As with Professor Mistelis' expert witness opinion, Professor Coe's expert opinion provides helpful analysis of the jurisprudence, particularly with respect to excessive regulatory, legislative, and judicial exercise of sovereignty giving rise to actionable unfair treatment exemplifying breach of the fair and equitable treatment standard of protection and expropriation. Professor Coe's contextualization of the undisputed facts underlying this case within a jurisprudential context is informative, instructive, and dispositive. Claimant respectfully invites the Tribunal to consult his work.



endemic to a BIT. Thus, by way of example, the TPA has a Financial Services Chapter and its own financial services standards of protection, some of which, such as the Articles 12.2 (National Treatment) and 12.3 (MFN) treatment protection standards, have Investment Chapter counterparts. These structural and substantive features are not present in most BITs. They matter and must be considered.

280. If they are not considered, then Financial Services investors are treated no differently than as forming part of Chapter 10 (Investment) but having only two enforceable treatment protection standards: Articles 10.7 (Expropriation and Compensation) and 10.8 (Transfers). Under this approach Chapter 12 is simply carved out of the Agreement and removed from any contextual consideration. This treatment cannot be reconciled with the workings, text, context, and objectives of the TPA.

281. The policies attendant to an agreement that covers both trade *and* investment protection objectives are broader than those incident to most BITs. Because the predecessor template for the TPA is the NAFTA (the NAFTA is in effect the *travaux préparatoires* of the TPA), Claimant also interprets Art. 12.1.2(b), Chapter 12 (Financial Services), and the entirety of the TPA in accordance with Art. 102 (Objectives) of the NAFTA. Claimant urges the Tribunal to consider this framework of interpretation as well as the VCLT in

construing the TPA, and particularly the scope and substantive provisions of Chapter 12.

282. Article 102(2) (NAFTA) provides that “[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.” In turn, Art. 102(1) reads:

The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party’s territory;
- (e) create effective procedures for the implementation and application of this

Agreement, for its joint administration and for the resolution of disputes; and (f) established a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

283. In addition, four simple principles are rigorously followed. First, the language in Art. 12.1.2(b) is considered “in good faith” and “in accordance with [its] ordinary meaning.” Hence, Art. 12.1.2(b) reads:

(b) Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter *solely* for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.

(emphasis supplied).

284. Claimant interprets the word “solely” in this provision as incorporating into Chapter 12 the four Articles that are there mentioned from Chapter 10. This means that Claimant acknowledges that all other substantive provisions

contained in Chapter 10 are excluded from Chapter 12.

285. According to this plain meaning interpretation, Claimant also understands that Art. 12.1.2(b) incorporates into Chapter 12 the procedural ISDS rules contained in Section B of Chapter 10. In conformance with this plain meaning textual interpretation, Claimant interprets the word “solely” as pertaining only to the four Articles incorporated into Chapter 12 from Chapter 10 with respect to that Chapter’s substantive provisions. Claimant does not read into the word “solely” as extending in *any* manner to *any* substantive provision contained in Chapter 12.

286. The plain language of Art. 12.1.2(b) does not support extending the word “solely” to the provisions contained in Chapter 12. Claimant’s plain meaning interpretation of Art. 12.1.2(b) does not limit or omit the enforceability of Art. 11.10 (Transfers and Payments) contained in Art. 12.1.2(c), which obviously immediately follows subsection (b) of that Article.

287. Claimant’s interpretation also relies on and comports with a very simple proposition concerning the treaty practice of both the United States and Colombia. This practice is set forth in detail in Mr. Wethington’s Expert Report and also is referenced in Mr. Wethington’s Supplemental Expert Report. Claimant discusses it in

considerable detail in another subsection of this *ratione voluntatis* analysis.<sup>195</sup>

288. For present purposes, it can be succinctly summarized and illustrated as follows; the US and Colombia explicitly state in writing any qualifications or restrictions to a right or obligation in a treaty or an agreement. Both the US and Colombia continue to implement this practice in negotiating and drafting the TPA.

289. Footnote 2 to Art. 10.4 (MFN) (Investment) already has been discussed in connection with its Investment Chapter counterpart, Art. 12.3 (MFN), the latter does not have any qualifying or restrictive language. Claimant invites the Tribunal and any interpreter logically to conclude that if the Parties sought to limit the scope or application of Art. 12.3 (MFN) in this Financial Services Chapter, in keeping with their practice they simply would have done so. But they instead elected not to provide any such qualification or restriction. Claimant suggests that this commonsensical and deliberate drafting decision should be accorded weight.

290. In this connection, perhaps a comparable or even greater example is present in the TPA's Chapter 11 (Cross-Border Trade in Services). Quite notably, that Chapter is rife with

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<sup>195</sup> See Part II titled "Claimant Meets the *Ratione Voluntatis* Jurisdictional Predicate which Has Not Been Rebutted."

many substantive treatment protection standards and equally substantial provisions. By way of example, Chapter 11 (Cross-Border Trade in Services) contains *most* of the treatment protection standards found in Chapter 12 such as (i) MFN (Art. 11.3),<sup>196</sup> (ii) Market Access (Art. 11.4),<sup>197</sup> and

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<sup>196</sup> Article 11.3 (MFN) reads:

Each Party shall accord to service suppliers of another Party treatment no less favorable than it accords, in like circumstances, to service suppliers of any other Party or any non-Party.

<sup>197</sup> Article 11.4 (Market Access) provides:

No Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on:

(i) the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test,

(ii) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test,

(iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of an economic needs test [true to the practice of limiting rights and obligations by expressly stating, this paragraph provides that '[t]his clause does not cover measures of a

(iii) Transparency in Developing and Applying Regulations (Art. 11.8)<sup>198</sup>.

291. It is clear, however, that the substantive provisions of Chapter 11 (Cross-Border Trade in Services), including Articles 11.2 (National Treatment) and 11.3 (MFN) are not enforceable by Financial Services investors in an ISDS context, or at all. The reason is simple.

292. Article 11.1 governing the scope and coverage of Chapter 11 (Cross-Border Trade in Services) is qualified by Footnote 1. That footnote reads:

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Party that limit inputs for the supply of services’], or

(iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; or

(b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

<sup>198</sup> In keeping with the practice of plainly stating in writing any qualification or restriction to a right or obligation, this Article has a Footnote stating that “[f]or greater certainty, ‘regulations’ includes regulations establishing or applying to licensing authorization or criteria.”

The Parties understand *that nothing in this Chapter, including this paragraph*, is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).

(emphasis supplied).

293. No such qualification is present in Chapter 12 (Financial Services). Therefore, Claimant interprets Art. 12.1.2(b) in keeping with the Parties' treaty drafting practice of explicitly stating in writing limitations to rights or obligations. Respondent ignores this practice in its interpretation of Art. 12.1.2(b), and more generally of the entire TPA.

294. In fact, because Respondent elects to turn a blind eye to this practice, and offer no testimony contesting Mr. Wethington's Expert Report, or proffer any material to the contrary (relying only on the argument of counsel), the Tribunal is invited to accord greater weight, if not altogether accept, Mr. Wethington's testimony on this point.

295. Claimant construes Art. 12.1.2(b) such that *all* Chapter 12 (Financial Services) substantive and procedural provisions have meaning and are enforceable, in accordance with VCLT Articles 31, and 32. Reading the term "solely" as applying to the four substantive provisions imported into Chapter 12 (Financial Services) from Chapter 10



(Investment) and not as extended to Chapter 12, reconciles the utility, meaning, and application of all substantive and procedural provisions comprising Chapter 12. Accordingly, and perhaps most notably, pursuant to this plain meaning interpretation, provisions such as Art. 12.2 (National Treatment) and Art. 12.3 (MFN) are not reduced to the status of rights without remedies.

296. In construing Art. 12.1.2(b) Claimant assumes that Financial Services investors will be accorded enforceable rights and are not going to be treated any less favorably than the entire universe of prospective investors who would qualify for Chapter 10 (Investment) treatment protection standards.

297. Claimant does not read Art. 12.1.2(b), or any provision of Chapter 12 or the TPA, as *restrictive* or *expansive*, but rather as functional based on its content and objective. The clear purpose and intent of Chapter 12 is to accord Financial Services investors with protections that would encourage and facilitate cross-border investments in financial services. Claimant's construction of Art. 12.1.2(b) conforms with these objectives and practical workings.<sup>199</sup>

298. As set forth in much greater detail in another subsection of this writing on *ratione voluntatis*, the testimony of the NAFTA's lead

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<sup>199</sup> See Respondent's Answer Memorial ¶¶ 300-306.

negotiator of Chapter 14 (Financial Services) of that Agreement, Mr. Olin Wethington, asserts in negotiating the NAFTA Chapter 14 (Financial Services) predecessor to Chapter 12 (Financial Services) of the TPA, that the United States and the other two NAFTA Parties intended for Financial Services investors to be able to enforce through investor-State arbitration the Chapter 14 (Financial Services) national treatment protection standard (Art. 1405) and the MFN treatment protection standard (Art. 1406).

299. Mr. Wethington has offered this testimony as a matter of expert legal opinion.<sup>200</sup> But of equal or perhaps greater practical application, Mr. Wethington has testified to this proposition *also* as a matter of factual personal knowledge.<sup>201</sup>

300. Simply stated, virtually all of Mr. Wethington's testimony with respect to the intent of the United States as a NAFTA Party concerning the Financial Services Chapter 14 of that Agreement, and the Agreement's objective, is based upon personal knowledge arising from his former capacity as the United States' lead negotiator of the Financial Services Chapter of the NAFTA.<sup>202</sup>

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<sup>200</sup> First Expert Report Mr. Olin L. Wethington ¶¶ 4, 6, 13.

<sup>201</sup> First Expert Report Mr. Olin L. Wethington ¶¶ 19-22.

<sup>202</sup> First Expert Report Mr. Olin L. Wethington ¶ 22.

301. Respondent has not offered an expert opinion or factual testimony challenging Mr. Wethington's expert and fact testimony, beyond the argument of counsel.

**III. THE WITNESS STATEMENT OF THE FORMER ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS MATTERS OF THE TREASURY DEPARTMENT HAS NOT BEEN CHALLENGED AND THEREFORE MUST BE ACCORDED GREAT WEIGHT OR ALTOGETHER ACCEPTED**

**A. Mr. Olin Wethington's Expert Report Furthers the Directives of VCLT Articles 31.1, 31.2(c), and 32**

302. The scope of Mr. Wethington's responsibilities as lead negotiator of the Financial Services Chapter "was to formulate and achieve US negotiating objectives." He testifies that as part of this responsibility he "directed the NAFTA negotiations relating to the financial services chapters sector, including the provisions governing banking, securities and insurance. This extended to the provisions relating to investment and operation within these sectors, including the provisions on national treatment and most-favored-

nation (MFN) protection and dispute resolution in financial services.”<sup>203</sup>

303. Because of this unique expertise and experience with the chapter of the NAFTA that undisputedly served as the predecessor paradigm-template for Chapter 12 (Financial Services) of the TPA, Mr. Wethington was invited to serve as a fact and expert witness in this proceeding. In doing so, he submitted his first witness statement, which sets forth his personal knowledge, specific experience with, and understanding of the workings of the NAFTA’s Investment and Financial Services Chapters.

304. Furthermore, the contextual negotiating environment of the NAFTA required the NAFTA parties to include broad MFN protection standards for cross-border investors in financial services because of the economic crisis that Mexico at the time recently had endured. Consequently, Mr. Wethington asserts that “[a]n interpretation of NAFTA Article 1401(2) [Scope and Coverage] that limits investor-State settlement procedures to the five referenced Chapter 11 investment protections would render the MFN protection toothless.”<sup>204</sup>

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<sup>203</sup> First Expert Report Mr. Olin L. Wethington ¶ 22.

<sup>204</sup> First Expert Report Mr. Olin L. Wethington ¶ 39.

305. The anomaly with this position is clear and Mr. Wethington testifies to it in the context of the Treasury Department's policy at the time, which informed the NAFTA negotiator's policy objectives. He states that "under this view [a reading of Chapter 14 as limited only to the dispute resolution procedural and substantive rights of Chapter 11] the Parties would have deliberately created a significant substantive obligation without a meaningful remedy. This interpretation would be incongruous with the Treasury Department's imperative to provide strong investment protection to financial services investors."<sup>205</sup> Mr. Wethington testifies to this imperative as a factual matter based on personal knowledge.

306. The historical context and the objectives with respect to which the NAFTA Chapter 14 MFN clause was negotiated altogether have been carved out of Respondent's analysis under the theory that such testimony is but irrelevant and non-instructive in construing the TPA because for unexplained reasons this testimony "clearly [is] not equivalent to *travaux préparatoires* for interpretative purposes."<sup>206</sup>

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<sup>205</sup> First Expert Report Mr. Olin L. Wethington ¶ 39.

<sup>206</sup> Respondent misapprehends the practical significance of the status of the NAFTA as the predecessor template of the TPA. The NAFTA is in effect the *travaux préparatoires* of the

307. Instead, Respondent has engaged in a two-fold strategy to undermine the very factual and expert testimony that Mr. Wethington has contributed to this case and that, of course, should inform this Tribunal’s understanding of the relevant provisions of Chapter 12. First, Respondent suggests that Mr. Wethington’s testimony is irrelevant and not worthy of any consideration because the testimony in Respondent’s own words is simply not “even instructive in interpreting the TPA.”<sup>207</sup> Indeed, Respondent’s own words can find no substitute:

Mr. Wethington’s personal recollections about the negotiation of NAFTA are neither authoritative, persuasive, or even instructive in interpreting the TPA, and are clearly not equivalent to *travaux préparatoires* for interpretative purposes.<sup>208</sup>

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TPA. As explained in greater detail below, Respondent’s treaty negotiators did not “negotiate” the TPA. Instead, they adopted the NAFTA predecessor Chapters. The one salient difference are the restrictive footnotes that were added, such as the Chapter 10 (Investment) Footnote 2 restrictive qualification.

<sup>207</sup> See Respondent’s Counter Memorial on Jurisdiction ¶ 353.

<sup>208</sup> *Id.*

308. When stripped to its core meaning, Respondent asserts that because Mr. Wethington is a natural person and not an inanimate draft piece of paper, his testimony is of no moment. This proposition speaks for itself and defies characterization.

309. Second, throughout the *ratione voluntatis* section of Respondent's Counter Memorial,<sup>209</sup> propositions from Mr. Wethington's first Expert Report have been "cherry-picked" out of context and submitted to "cut and paste" legal analysis.

310. There is in the Counter Memorial as appears to be the case for example with most of the arbitral awards upon which Respondent relies, no systematic attempt to engage in anything less than a piecemeal approach to legal analysis. There is no systemic consideration of the foundational factual and legal predicates underlying the testimony.

311. With respect to both approaches, Claimant now us compelled to bring to this Tribunal's attention the extent to which in formulating policies and objectives for the NAFTA, Mr. Wethington's Expert Report directly comports with the VCLT's Articles 31 and 32 directives and NAFTA working papers, along with other materials

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<sup>209</sup> Respondent's Counter memorial on Jurisdiction ¶¶ 279-380.

contemporaneous with the NAFTA's negotiation and ratification.

312. Accordingly, Mr. Wethington has filed a supplemental Expert Report that generously draws on these materials. In addition to the *travaux préparatoires*, Mr. Wethington's supplemental Expert Report explicitly references and attaches relevant portions of Mr. Barry S. Newman's testimony before the House Committee.

**B. Respondent's Counter Memorial Did Not Address Material Premises Asserted in Olin Wethington's Expert Report.**

**1. The Historical Negotiating Context and Objectives of the Negotiating Teams was not Challenged or Contested**

313. Respondent does not contest that as Assistant Secretary Olin Wethington "served as lead negotiator of the financial services chapter of the NAFTA," and that his "primary responsibility" in this capacity "was to formulate and achieve US negotiating objectives."<sup>210</sup> This proposition is important because Mr. Wethington testifies that these responsibilities "extended to the provisions relating to investment and operation within [the banking, securities, and insurance sectors], including provisions on national treatment and

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<sup>210</sup> First Expert Report Mr. Olin L. Wethington ¶ 22.



most-favored-nation (MFN) protection and dispute resolution in financial services.”<sup>211</sup> Similarly, Respondent does not challenge Mr. Wethington’s testimony that the NAFTA served as a model template for the TPA.

314. Mr. Wethington testifies that the “influence of NAFTA on US trade policy and subsequent free trade agreements has been profound.” He adds that “[t]he NAFTA provided the template for the financial services chapters of later free trade agreements.”<sup>212</sup> The context in which the NAFTA negotiations took place was one that sought to provide investors in the Financial Services sector with “robust investment protections and investor-state dispute settlement that went well beyond the state-to-state dispute settlement provisions in the United States-Israel FTA.”<sup>213</sup>

315. Mr. Wethington testifies that as part of the NAFTA negotiating history and context, “the US negotiating team believed that certain guarantees were essential to the agreement [Chapter 14 Financial Services] – most importantly, the obligations to provide national treatment and

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<sup>211</sup> *Id.*

<sup>212</sup> First Expert Report Mr. Olin L. Wethington ¶ 23.

<sup>213</sup> *Id.*

most-favored-nation protection.”<sup>214</sup> These fulsome investor protection standards were necessary, according to the unchallenged testimony, because the Mexican negotiators opined that without these enforceable protection standards US and Canadian investors would not be enticed to invest in the Mexican financial sector.<sup>215</sup>

316. The historical context of the NAFTA’s negotiation, according to the unchallenged testimony before this Tribunal, is one in which the contracting States necessarily contemplated and negotiated for a NAFTA MFN provision that would be expansive in scope.<sup>216</sup> Mr. Wethington further testifies that the contracting parties negotiated for and secured an MFN provision that would not be qualified in scope “unless otherwise expressly limited.”<sup>217</sup>

317. The trade policy that the NAFTA negotiators sought to implement required robust protection standards for investors in financial services, in part, because “financial services investors were viewed as critical in the aftermath

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<sup>214</sup> First Expert Report Mr. Olin L. Wethington ¶ 25.

<sup>215</sup> *Id.*

<sup>216</sup> First Expert Report Mr. Olin L. Wethington ¶ 27.

<sup>217</sup> *Id.*

of the sovereign debt crisis that had engulfed the Latin American region.”<sup>218</sup>

**a. Respondent Does Not Address Olin Wethington’s Testimony Concerning US Treaty Practice Leading up to the NAFTA**

318. Mr. Wethington testifies to two foundational analyses concerning the United States’ consistent treaty practice pertaining to national treatment and MFN clauses leading up to the NAFTA. Respondent does not address this testimony. Detailed analysis is compelled.

**i. Prior NAFTA US Treaty Practice Excluded Financial Services MFN Protection**

319. The testimony asserts that the NAFTA Parties sought to increase investment opportunities and protections. Thus, they included national treatment and MFN protection standards. In support of this proposition Mr. Wethington points to the US-Israel FTA (1995) and the US-Canada FTA (1988). The first of these agreements (US-Israel FTA) altogether lacked an MFN provision

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<sup>218</sup> First Expert Report Mr. Olin L. Wethington ¶ 30.

concerning financial services.<sup>219</sup> Indeed, the single MFN clause in that agreement is contained in Art. 14 (Intellectual Property).<sup>220</sup>

320. The US-Canada FTA had a Financial Services Chapter (Chapter 17) separate and distinct from that agreement's Investment Chapter (Chapter 16). Neither Chapter 16 (Investment) nor Chapter 17 (Financial Services) had an MFN clause. Chapter 17 had very limited obligations running in favor of the Parties' nationals.

321. The testimony observes that the "NAFTA significantly enlarged upon the application

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<sup>219</sup> FirstExpert Report Mr. Olin L. Wethington ¶ 27.

<sup>220</sup> That Article reads:

[INTELLECTUAL PROPERTY]

The Parties reaffirm their obligations under bilateral and multilateral agreements relating to intellectual property rights, including industrial property rights, in effect between the Parties. Accordingly, nationals and companies of each Party shall continue to be accorded *national and most favored national treatment* with respect to obtaining, maintaining and enforcing patents of invention, with respect to obtaining and enforcing copyrights, and with respect to rights in trademarks, service marks, trade names, trade labels, and industrial property of all kinds.

(emphasis supplied).

to financial services by including in a standalone financial services chapter a broad MFN protection, which was non-existent in both prior treaties. The Parties' intention is reflected in the final ratified text of the NAFTA."<sup>221</sup>

322. He adds that similarly, "the NAFTA Parties intended that this broad MFN treatment cover any dispute resolution related to investment protection enjoyed by third-country investors in the host NAFTA Party." He adds that the "inclusion of express language specifically referencing procedural rights was not necessary, because the plenary language of the MFN provision was by its plain meaning adequate to incorporate procedural protections – *certainly in the absence of any language expressly limiting its scope of the MFN provision.*" (emphasis supplied).<sup>222</sup>

323. Notably, Respondent's Counter memorial does not at all reference the exclusion of MFN provisions attaching to the Financial Services sections of pre-NAFTA agreements to which the US is a signatory. As the testimony underscores, this prior practice demonstrates the NAFTA Parties' intent to expand Financial Services investor protection.

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<sup>221</sup> First Expert Report Mr. Olin L. Wethington ¶ 27.

<sup>222</sup> First Expert Report Mr. Olin L. Wethington ¶¶ 28-29.

**ii. The United States' Treaty Practice Demonstrates That Where It Intends to Limit the Scope of an MFN Provision it Expressly Does So**

324. Absent from Respondent's Counter Memorial is any observation on the United States' treaty practice *expressly*, and not contextually or implicitly, limiting the scope of MFN clauses in treaties. Two specific examples are provided: the Albania-US BIT, and the signed but not ratified Trans-Pacific Partnership.

325. The Albania-US BIT explicitly limits and qualifies the MFN treatment by providing that "a Party is not required to extend to covered investments national or MFN treatment with respect to procedures provided for in multi-lateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights."<sup>223</sup>

326. Additional limitations to the MFN clause in paragraph 1, Art. II of the US-Albania BIT are contemplated as possible contingencies.

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<sup>223</sup> Albania-US BIT Art. II (Treatment of Investment), Letter of Submittal, August 3, 1995; First Expert Report Mr. Olin L. Wethington ¶ 30.

Paragraph 2 of that BIT demonstrates the US practice requiring *explicit* and express written qualifications, restrictions, or limits to MFN treatment.

327. It provides, in part that “the Parties may adopt or maintain exceptions to the national and MFN treatment standard with respect to the sectors or matters specified in the Annex [insurance]. In principle, further restrictive measures are permitted in each sector. *The careful phrasing and narrow drafting of these exceptions is therefore important.*” (emphasis supplied).<sup>224</sup>

328. The Trans-Pacific Partnership also is illustrative of the United States’ established treaty practice of expressly and explicitly stating limitations to the scope of investor protection standards, naturally also including MFN treatment. By way of example, in that treaty Art. 9.5 (Most-Favored-Nation Treatment) is restricted by the explicit language contained in Art. 9.5.3. This qualifying restrictive provision reads:

3. For greater certainty, the treatment referred to in this Article *does not encompass international dispute resolution procedures or mechanisms, such as those included in*

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<sup>224</sup> *Id.* Art. II, ¶ 2.

*Section B (Investor-State Dispute Settlement).*

(emphasis supplied).

329. The national treatment protection standard is qualified and restricted by a footnote. Thus, Art. 9.4 (National Treatment), f.n. 14 states:

For greater certainty, whether treatment is accorded in 'like circumstances' under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

330. Similarly, Art. 9.6 (Minimum Standard of Treatment) is expressly qualified and restricted by Footnote 15. The restricting qualification provides that "Article 9.6 (Minimum Standard of Treatment) shall be interpreted in accordance with Annex 9-A (Customary International Law)."<sup>225</sup>

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<sup>225</sup> Annex 9-A (Customary International Law) provides:

**CUSTOMARY INTERNATIONAL LAW**



331. Article 9.8 (Expropriation and Compensation) is restricted and qualified for purposes of providing a definition to treaty terms that may have more than one meaning. By way of example, the expropriation “for a public purpose” element is clarified in order to distinguish the use of this term in public international law from its domestic law counterpart. The clarification language contained in footnote 17 to Art. 9.8.1(a) (For a Public Purpose) asserts:

For greater certainty, for the purposes of this Article, the term ‘public purpose’ refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as ‘public necessity’, ‘public interest’ or ‘public use’.

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The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

332. Indeed, particulars as to conditions attaching to the *identity* of the expropriating Party and different corresponding iterations of the public purpose doctrine also explicitly are addressed in unequivocal *qualifying language* in footnote 18. The second clarification pertaining to Art. 9.8.1(a), public purpose, states:

For the avoidance of doubt: (i) if Brunei Darussalam is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Code* (Cap. 40) and the *Land Acquisition Act* (Cap. 41), as of the date of entry into force of the Agreement for it; and (ii) if Malaysia is the expropriating Party, any measure of direct expropriation relating to land shall be for the purposes as set out in the *Land Acquisition Act 1960*, *Land Acquisition Ordinance 1950* of the State of Sabah and the *Land Code 1958* of the State of Sarawak, as of the date of entry into force of the Agreement for it.

333. The entirety of Art. 9.8 (Expropriation and Compensation) is restricted, among other things, to exclude “creeping expropriations.” Non-discriminatory exercises of regulatory sovereignty

concerning legitimate public purpose objectives also give rise to exceptions to a claim alleging a violation of the expropriation protection standard.<sup>226</sup>

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<sup>226</sup> These restrictions, together with accompanying clarifications are contained in Annex 9-B (Expropriation) to the treaty. This annex is illustrative of the *United States' treaty practice of plainly stating restrictions to protection standards*. Annex 9-B reads:

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party *cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.*

2. Article 9.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by Article 9.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) *The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a*

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*case-by-case, fact-based inquiry that considers, among other factors:*

(i) *the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;*

(ii) *the extent to which the government action interferes with distinct, reasonable investment-backed expectations;*<sup>36</sup> and

(iii) *the character of the government action.*

(b) *Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,<sup>37</sup> safety and the environment, do not constitute indirect expropriations, except in rare circumstances.*

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<sup>36</sup> *For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the*

334. The Trans-Pacific Partnership Agreement, in keeping with the practice of explicitly stating restrictions on obligations and rights, illustrates as much in Art. 9.9 (Transfers). Here the qualifying footnote references Annex 9-E (Transfers).<sup>227</sup>

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*potential for government regulation in the relevant sector.*

*<sup>37</sup> For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids, and appliances and blood and blood-related products.*

(emphasis supplied).

<sup>227</sup> Annex 9-E provides:

Chile

1. Notwithstanding Article 9.9 (Transfers), Chile reserves the right of the Central Bank of Chile (*Banco Central de Chile*) to maintain or adopt measures in conformity with Law 18.840, Constitutional Organic Law of the Central Bank of Chile (*Ley 18.840, Ley Orgánica Constitucional del Banco Central de Chile*), and *Decreto con Fuerza de Ley No. 3 de 1997, Ley General de Bancos* (General Banking Act) and *Ley 18.045, Ley de Mercado de Valores* (Securities Market Law), in order to ensure currency stability and the normal operation of domestic and foreign payments.

335. The treaty practice analysis that the testimony explains is helpful, and perhaps even necessary, in understanding that such treaty practice was directly and explicitly carried over into the drafting of the Colombia-US TPA.

336. Indeed, Mr. Wethington testified as much. He states that “this is the approach the United States and Colombia took in the TPA. Footnote 2 of the MFN clause in Art. 10.4 [Investment] of the TPA governing protections for **non-financial services** investments *does* expressly exclude certain dispute resolution rights as follows:

For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other

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Such measures include, *inter alia*, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement (*encaje*).

2. Notwithstanding paragraph 1, the reserve requirements that the Central Bank of Chile can apply pursuant to Article 49 No. 2 of Law 18.840, shall not exceed 30 per cent of the amount transferred and shall not be imposed for a period which exceeds two years.

disposition of investments,' referred to in paragraphs 1 and 2 of Article 10.4 *does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.*

(emphasis in original)<sup>228</sup>

337. Here again Respondent does not offer a satisfactory explanation that reconciles this practice with the annotation in the Art. 10.4 (MFN) of the Investment Chapter with the unrestricted Art. 12.3 (MFN) of the Financial Services Chapter.

338. Respondent invites the Tribunal to adopt one of two untenable propositions. The first calls for simply ignoring any differences between Art. 10.4 (MFN) and its qualifying restrictive language, and the unrestricted literal text of Art. 12.3 (MFN). When it concerns this part of the analysis (a plain meaning textual analysis of Articles 10.4 and 12.2 of the TPA), Respondent remarkably abandons its professed adherence to plain meaning textual language, much as it did in reading the *expressio* axiom as applying to all of the standards of protection articulated in Chapter 12 (Financial Services).

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<sup>228</sup> First Expert Report Mr. Olin L. Wethington ¶ 33.

339. This approach is unavailing. Ignoring that the drafters explicitly limited one MFN provision and not the other on its face is suspect. It also ignores treaty practice predating the drafting of both Articles 10.4 (MFN) and 11.3 (MFN).

340. The second approach that Respondent appears to adopt, certainly so far as Claimant is able to discern, is the interpretive construction already discussed.

341. The United States' treaty practice of expressly restricting rights and obligations, as Mr. Wethington testifies and common sense dictates, brings greater clarity to the relationship between the Chapter 10 restricted Art. 10.4 (MFN) provision and its unrestricted and expansive Chapter 12, Art. 12.3 (MFN) counterpart.

**C. The United States and Colombia Explicitly State in Writing Qualifications and Limitations to Rights and Obligations**

342. In addition to the examples already canvassed to which Mr. Wethington has testified, other instances of treaty practice merit consideration.

343. The Parties' treaty practice of explicitly stating in writing limitations and qualifications to rights and obligations is present irrespective of the treaty structure at issue. In



TPAs and FTAs a common pattern that aligns itself with the TPA in this case is very much present.

344. Research has not yielded a single treaty or agreement where either the United States or Colombia has restricted an MFN clause contained in a Financial Services Chapter. The Colombia-Panama FTA (2013) is helpful.

345. In that agreement the Art. 14.4 *Investment Chapter* MFN clause (Art. 14.4.3) reads:

3. For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, administration, conduct, operation and sale or other disposition of the investments’ referred to in paragraphs 1 and 2 shall not comprise the mechanisms for dispute settlement like the one contained in the present Chapter, that form part of international commercial treaties and agreements.<sup>229</sup>

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<sup>229</sup> The Spanish language original provides:

Para mayor certeza, el trato ‘con respecto al establecimiento, adquisición, expansión, administración, conducción, operación y venta u otra disposición de las inversiones’ referido en los párrafos 1 y 2 no comprende los mecanismos de solución de controversias como los del presente Capítulo, que están provistos

346. Significantly, the MFN clause forming part of that agreement's Financial Services Chapter, Art. 16.3, contains no such qualification or restriction, as is the case with Art. 12.3 (MFN) of the TPA that here concerns us. Moreover, Art. 16.3 (MFN) of the Panama-Colombia TPA is broader than its Art. 14.4 (MFN) Investment Chapter counterpart.

347. Article 16.3 (the Financial Services MFN) does not contain the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment," language that the restriction qualifies. Hence, as with the TPA at issue before this Tribunal, the qualifying language that the Art. 14.4 Investment Chapter MFN of the Panama-Colombia TPA restricts itself is absent from the Investment Chapter Art. 16.3 MFN. Both of these provisions in the Panama-Colombia FTA, Art. 14.4 (MFN) contained in the Chapter 14.4 (MFN) of the Investment Chapter and Art. 16.3 (MFN) of the Financial Services Chapter, are based upon the NAFTA Investment Chapter (Chapter 11) and Financial Services Chapter (Chapter 14).

348. The Art. 16.3 (MFN) provision contained in the Financial Services Chapter of the Panama-Colombia FTA is identical in every regard

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en tratados o acuerdos internacionales de comercio.

to the Art. 12.3 (MFN) provision contained in the Financial Services Chapter of the TPA before this Tribunal.

349. Equally helpful is the Perú-US TPA (2006). That TPA also contains a Financial Services Chapter that is separate and distinct from its Investment Chapter counterpart. The Most-Favored-Nation provision of the Investment Chapter is identical to the MFN clause contained in the TPA before this Tribunal. In fact, even its numerical nomenclature is the same, “Art. 10.4.” In keeping with this virtually absolute symmetry, it is no surprise that the MFN provision contained in the Perú-US TPA also is identical in every regard to the MFN provision in Chapter 12 of the TPA before this Tribunal.

350. Indeed, the MFN clause contained in the Financial Services Chapter of the Perú-US TPA as well bears the same numerical nomenclature to the Colombia-US TPA, “Art. 12.3.” In both, the Panama-Colombia FTA and the Perú-US TPA, the Parties elected to restrict the Investment Chapter MFN clause and desisted from qualifying the Financial Services Chapter counterpart. The drafters deliberately did so. The reasonable and necessary inference that an interpreter must draw from these factual premises is that the Parties did not intend to preclude the Financial Services MFN provision from extending to ISDS procedural rights.

351. This conclusion is the most reasonable and, therefore, the likeliest to explain the empirical evidence within a reasoned and deliberate framework that discards happenstance as a governing principle.

352. The Korea-US FTA (2019) post-dating the TPA before this Tribunal, also is revealing. That agreement as well contains a free-standing Financial Services Chapter. The MFN clause in the Investment Chapter of the agreement contains the identical restrictive language present in Art. 10.4 (MFN) Footnote 2 of the TPA that is before this Tribunal. The only difference is that the restrictive language in the Korea-US FTA is presented as a separate paragraph in the very body of the article.<sup>230</sup>

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<sup>230</sup> Article 11.4 (MFN) reads:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment,

353. The Financial Services MFN clause, Art. 13.3, of that agreement is a single sentence unqualified declaration covering investments in financial institutions and cross-border financial service suppliers:

Each Party shall accord to investors of the other Party, financial institutions of the other Party, investments of investors in financial institutions, and cross-border financial service suppliers of the other Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of a non-Party, in like circumstances.

354. The provision is not restricted from extending to ISDS procedural rights. This clause as well lacks the “establishment, acquisition,

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acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

*3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B.*

(emphasis supplied).

expansion, management, conduct, operation, and sales or other disposition of investments,” language that the Investment Chapter provision modifies in the third paragraph of that article. The Financial Services Chapter of the Korea-US FTA is littered with qualifying and restrictive provisions, separate and distinct from the qualifications and restrictions of the very annexes themselves.<sup>231</sup>

355. Both Colombia and the US have entered into agreements where the MFN clauses in neither the Investment Chapter nor the Financial Services Chapter, has been qualified.<sup>232</sup> It is notable that in the context of BITs, which of course do not have Financial Services Chapters, restricted MFN clauses understandably are very common.<sup>233</sup>

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<sup>231</sup> In the format of footnote annotation alone the Chapter contains ten such qualifications or restrictions ranging from scope to applicable legislative provisions.

<sup>232</sup> See *e.g.*, Art. 12-6/12-7, Art. 17-3 Colombia-Mexico-Venezuela FTA (1995) CL-0310, Art. 10.3/12.3 Chile-US FTA (2004) CL-0329, Art. 10.4/12.3 Morocco-US FTA (2004) CL-0331, Art. 11.4/13.3 Australia-US FTA (2004) CL-0327, Art. 10.4/12.3 Panama-US (2012) CL-0333.

<sup>233</sup> See *e.g.*, Art. V.3 BLEU Colombia BIT (2009) CL-0300, Art. 4.3 India-Colombia BIT (2009) CL-0319, Art. III.2 UK-Colombia BIT (2010) CL-0312, Note to Art.3(1) Japan-Colombia BIT (2011) CL-0320, Art. 6.4 Singapore-Colombia BIT (2013) CL-0323, Art. 3.6 Korea-Colombia BIT (2010) CL-0321, Art. 5.5 Turkey-Colombia BIT (2014) CL-0326.

356. In addition to the evidence in the form of treaty practice demonstrating that both the United States and Colombia explicitly in writing express qualifications and restrictions to obligations and rights, the evidence likewise demonstrates that neither State has qualified an MFN provision contained in the Financial Services Chapter of an agreement. Under no reasonable analysis can it be inferred from this body of international agreements that when either State refrains from qualifying an MFN provision the absence of restrictive qualifying language is meaningless. Such conclusion is all the more incongruous where, as here, the Investment Chapter MFN provision is qualified to proscribe extension to ISDS procedural rights while the financial services counterpart MFN clause has no such restriction or even comparable language to which the restriction attaches.

**a. The Drafting Framework Supports Direct Claims to Enforce Chapter 12 Substantive Provisions**

357. As more fully set forth in Mr. Wethington's Expert Report, not just the Parties' treaty practice, but also treaty drafting frameworks generally, and that of the NAFTA in particular, cause restrictions to obligations or to rights to be expressly stated in writing. This feature of treaty structure matters. In the case of the NAFTA, and

therefore derivatively with respect to the TPA as well, the Parties agreed to a broad general framework.<sup>234</sup> This framework was then progressively qualified, restricted, and clarified through annexes, footnotes, and specific drafting provisions in the very body of the text.

358. The general to specific treaty structure and anatomy comports with the practice of expressly announcing limitations to rights and obligations. Respondent's analysis suggesting that somehow Art. 12.3 (MFN) should be read as if the text were restricted because Art. 10.4 is qualified, further asks the interpreter to disregard well established treaty structural features.

**b. Mr. Olin Wethington's Testimony Comports with Writings that Predate this Dispute by Decades**

359. Contemporaneously with the coming into effect of the NAFTA (January 1, 1994), Mr. Wethington published a book titled *Financial Market Liberalization: The NAFTA Framework (NAFTA Series)*.<sup>235</sup> That text serves as contemporaneous evidence of the context, object,

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<sup>234</sup> First Expert Report Mr. Olin L. Wethington ¶¶ 40, 45.

<sup>235</sup> OLIN WETHINGTON, *FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK (NAFTA SERIES)* (West Pub Co (December 1, 1994) CL-0353).



and purpose of the NAFTA generally, and of Chapter 14 in particular.

360. The text helps to shed light on the testimony that Mr. Wethington offers concerning the need for robust and enforceable protection standards concerning Financial Services investors. Also, this writing addresses dispute settlement within the NAFTA's Chapter 14 (Financial Services) rubric. Claimant submits that this text serves as a supplementary means of interpretation that is consonant with VCLT Art. 32.

**c. The Regional Latin American Financial Crisis and the Drafting of the NAFTA: the Need for Robust and Enforceable Financial Services Investor Protection Standards**

361. Mr. Wethington's contemporaneous writing contextualizes the negotiation of the NAFTA within the context of an economic environment in Latin America that is in crisis. This scenario is succinctly detailed in the following passage:

The region as a whole was in the forefront of the third world debt crisis. Major debtors in the region were unable to service enormous amounts of external debt. In addition, the

governing regimes throughout Latin America appeared unable politically to manage the domestic reforms required to enable them to overcome their internal economic problems.<sup>236</sup>

362. The general economic climate described throughout Latin America was one in which “new capital into the region completely dried up and capital flows became negative as funds left the region in massive volumes in order to obtain better returns elsewhere.”<sup>237</sup> It is further noted that “the export capacity of these countries plummeted. As a result, the interest charges on

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<sup>236</sup> OLIN WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK (NAFTA SERIES) 6 (West Pub Co (December 1, 1994) and referencing n. 5:

For treatment of the ‘lost decade’ for Latin American economic development, see John Williamson, *Institute of Int’l Econ*, The Progress of Policy Reform in Latin America (Washington, D.C. Jan 1990); Andrés Bianchi, Economic Commn for Latin America and the Caribbean, *Crisis, Adjustment, and Debt in Latin America, 1981-1985*, paper presented at the Eighth Annual Conference for Editors and Journalists, *Old Questions, New Crises: Latin America in 1980*, May 12-13, 1986, sponsored by the Latin American Program, Woodrow Wilson International Center for Scholars, Smithsonian Institution, Washington, D.C. CL-0353.

<sup>237</sup> *Id.* at 7.

external debt went unsatisfied and arrears on the debt accumulated to significant levels.”<sup>238</sup>

363. Mexico was not immune from the economic crisis of the time. The major indicators as reported in the text appeared troubling:

Mexico’s external debt was the largest among all Latin American countries, totaling approximately \$102 billion by 1988.<sup>239</sup> By the middle of the decade, Mexico’s ability to continue servicing its debt was severely strained; its external debt service obligation reached 28.9 percent of total export earnings in 1988.<sup>240</sup> Mexican exports also fell off sharply after 1984 and did not reach 1984 levels again until 1990.<sup>241</sup> Sales to its closest neighbor, the United States, showed weak performance and were essentially

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<sup>238</sup> *Id.* and also citing to for a detailed discussion of the Latin American debt crisis during the 1980s:

German Giraldo & Arthur J. Mann, *Latin American External Debt Growth: A Current Account Explanatory Model, 1973-1984*, 24 J Developing Areas No 1 (Oct. 1989).

<sup>239</sup> *Id.* Citing to Banco de Mexico, *The Mexican Economy 1994*, tbl V.3, at 152 (Mexico, May 1994) [in text].

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* citing to Aspe, *supra* note 8, table 1.5, at 18 [in text].

stagnant in the 1983 to 1986 time frame.<sup>242</sup> Moreover, the Mexican economy appeared hidebound by regulation. The competitiveness of Mexican industry lagged. Industry was hampered by excessive state involvement, and, in fact, major sections of the Mexican economy, including the Mexican banking system, were owned by the Mexican government.<sup>243</sup>

364. Moreover, this contemporaneous writing described the NAFTA negotiators as understanding that the NAFTA would serve as a template for future trade protection agreements between the United States and the rest of Latin America. The connection between the NAFTA and the TPA both structurally and substantively is evident:

United States negotiators saw themselves negotiating not only an arrangement with Mexico and Canada, but also an arrangement that would

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<sup>242</sup> *Id.* citing to Gary Clyde Haufbauer & Jeffrey J. Schott, Institute for Intl Econ, North American Free Trade: Issues and Recommendations, table 3.1, at 48 (1993) [in text].

<sup>243</sup> OLIN WETHINGTON, FINANCIAL MARKET LIBERALIZATION: THE NAFTA FRAMEWORK (NAFTA SERIES) 7 (West Pub Co (December 1, 1994)

be a template for other arrangements throughout the hemisphere. Therefore, in the minds of the United States negotiators, it was extremely important ‘to get the agreement right’ because it would be the standard or baseline against which other free trade agreements in the hemisphere would be judged and negotiated.

The precedential implications of the NAFTA were made more real to United States negotiators by the fact that other efforts at subregional integration within Latin America were proceeding alongside of NAFTA discussions. Renewed political commitments in the hemisphere in the early 1990s served to rejuvenate certain existing regional groupings such as Caricom, the Andean Pact, and the Central American Common Market.<sup>244</sup>

365. Accordingly, the testimony in Mr. Wethington’s Expert Report concerning (i) the context in which the financial Chapter 14 of the NAFTA was negotiated and (ii) the NAFTA’s Chapter 14 standing as a template for the TPA’s

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<sup>244</sup> *Id.* at 10.

Chapter 12 are independently memorialized by contemporaneous (1994) writings that the witness authored.

366. The context of the negotiations support the need to have enforceable protection standards that would attract Financial Services cross-border investors and protect such sector sensitive investments. The hearings held before the House Committee on the NAFTA's Chapter 14 (Financial Services) further corroborate the need for enforceable national treatment and expansive MFN treatment protection standards.

367. The testimony presented by the different US government agency representatives at the September 28, 1993 House Committee hearing all consistently identified national treatment and MFN as the Financial Services Chapter's core provisions. It certainly would not be an overstatement to characterize testimony as identifying Chapter 14 and the MFN and national treatment provisions as the NAFTA's principal drivers.

368. While the various presenters advanced different and often conflicting accounts of other policy considerations, quite notably all were of a single voice in identifying enforceable national treatment and MFN provisions as critical investor protection standards.

**d. The Testimony on National  
Treatment and MFN Before the  
House Committee on Banking,  
Finance, and Urban Affairs**

369. The testimony presented to the Tribunal concerning the primacy of the national treatment and MFN protection standards in Chapter 14 of the NAFTA and, therefore, derivatively with respect to Chapter 12 of the TPA, finds ample support in the records memorializing the testimony held on September 28, 1993.<sup>245</sup>

370. Testifying on behalf of the Board of Governors of the Federal Reserve system, Mr. John P. LaWare testified to the importance of Chapter 14 (Financial Services) national treatment, MFN, and comprehensive prudential measures exception as core features of the NAFTA. His testimony in part provides:

In summary, the financial services chapter of the NAFTA incorporates the principles of *most-favored-nation* and *national treatment* that have long been applied in the United States with respect to foreign investment.

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<sup>245</sup> Claimant's exhibit C-0032.

I want now to turn to some of the specific questions raised in your letter of invitation.

The Federal Reserve's principal objective has been to ensure that any trade agreement affecting banking contain a strong protection for the prudential actions of the regulators with respect to both individual institutions and the stability of the financial system itself. It is also important that any system set up to review *disputes in financial services* should include the active participation of financial experts. We shared these views with the Treasury Department, and provided technical assistance during the course of the negotiations.

In its final form, the NAFTA contains provisions that satisfy those concerns of the Federal Reserve. It protects the interests of prudential supervision while creating opportunities for United States banks and other financial firms in the Mexican market.<sup>246</sup>

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<sup>246</sup> LaWare testimony, Hearing before the Committee on Banking, Finance and Urban Affairs, House of



(emphasis supplied).

371. Mr. LaWare's testimony is based on the understanding that the exportation of national treatment and MFN protections to Mexico imposes no obligation on the United States. According to his account, the United States already provides such protections to non-US investors. Therefore, he views the exportation of protection standards that would cover US Financial Services investors in a volatile regulatory environment in Mexico as pivotal.

372. It is also important to note that Mr. LaWare's testimony focuses on such protection attaching to US "banks and other financial firms in the Mexican market," and having the substantive

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Representatives, One Hundred Third Congress, Serial No. 103-71 (September 28, 1993) at 7. For the sake of completeness and full disclosure, Mr. LaWare also testifies that "the NAFTA also provides for a financial services committee to supervise the implementation of the financial services provisions of the NAFTA. A dispute in financial services may only be brought by a government of a country."

Obviously, the testimony concerning dispute settlement is either wrong because even under the most extreme and restrictive approach, Art. 1401(2) provides ISDS for Arts. 1109 through 1111, 1113, and 1114, or the reference pertains to the enforcement through government-to-government arbitration of the Financial Services Committee's implementation of the financial services provisions of the NAFTA.

obligations structurally held by the NAFTA State Parties.

373. The representative of the United States Security and Exchange Commission (“SEC”), Mary Schapiro, presented compelling testimony on these issues as well. She prefaces a three-point analysis with the following observation:

NAFTA generally requires that each country grant both *national treatment* and *most-favored-nation* treatment to providers of and investors in financial services from other NAFTA countries. These general principles are subject to a number of qualifications, including most importantly a prudential exception which allows a NAFTA country to maintain or adopt measures to protect investors, to maintain safety of financial firms, and to ensure financial market stability.<sup>247</sup>

(emphasis supplied).

374. As did LaWare, Ms. Schapiro references the primacy of national treatment and

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<sup>247</sup> Schapiro testimony, Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred Third Congress, Serial No. 103-71 (September 28, 1993) at 10. C-0032.

MFN in the Financial Services Chapter. She suggests in addition, however, that the national treatment and MFN treatment protection standards are balanced by the strong prudential measures exception.

375. Also like LaWare, she represents that the SEC views the NAFTA as an Agreement that does not require the United States to incur additional obligations while causing Mexico in particular to adopt MFN and national treatment as protection standards that would safeguard prospective US Financial Services investors in that jurisdiction:

Let me conclude by reiterating that, because the U.S. securities laws already provide the *national treatment* and *most-favored-nation* treatment required by the NAFTA, and because NAFTA specifically provides for prudential securities regulation, NAFTA will not affect the SEC's ability to regulate the U.S. securities markets or indeed require any changes at all in the U.S. securities laws or rules.<sup>248</sup>

(emphasis supplied).

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<sup>248</sup> *Id.* at 11.

376. Allene Evans presented testimony on behalf of the NAFTA Working Group on the National Association of Insurance Commissioners. Ms. Evans' understanding of the importance of national treatment and MFN status in the greater context of the NAFTA, let alone with respect to the subject matter of the testimony, which was confined to Chapter 14 (Financial Services), was unequivocal:

The agreement generally establishes principles allowing the right to establish operations in other NAFTA countries to receive *national treatment* and *most-favored-nation* status, to engage in certain cross-border trade, and hire personnel regardless of nationality. These principles remain subject on an ongoing basis to prudential regulation in order to protect the public and a one-time reservation of nonconforming measures. Additionally, there are transitory limitations on United States and Canadian insurance operations in Mexico.<sup>249</sup>

(emphasis supplied).

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<sup>249</sup> Evans testimony, Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred Third Congress, Serial No. 103-71 (September 28, 1993) at 12. C-0032.

377. On the subject of dispute resolution, she observes that “because insurance is fundamentally regulated by the States [referring to the States comprising the union of the United States] and not by the Federal Government, NAFTA does not provide for State participation in dispute resolution.”<sup>250</sup>

378. Barry S. Newman, Deputy Assistant Secretary for International Monetary Affairs, Department of the Treasury, testified as the representative for the Department of the Treasury. Mr. Newman reported to Mr. Olin Wethington. His testimony comports with Mr. Wethington’s Expert Report concerning the central role of national treatment and MFN in Chapter 14 of the NAFTA. Mr. Newman’s testimony further underscores the importance of having protections that would allow Financial Services investors to enforce national treatment and MFN treatment protection standards.

379. Mr. Newman speaks of “US firms” enforcing such rights. His testimony merits close scrutiny and consideration:

The rules guarantee important rights for U.S. firms. The *national treatment* and *MFN provisions* ensure that

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<sup>250</sup> *Id.* at 13.

United States firms will be treated as favorably as Canada and Mexico treat their domestic firms or the firms of any country. The provisions on new products will enable United States financial firms to provide the same products and services in Mexico and Canada that they do here at home, thereby maximizing their ability to use their very strong competitive advantages.<sup>251</sup>

380. He adds that “[t]he cross-border provisions guarantee that United States firms will continue to conduct current cross-border operations and provide services to customers in Mexico and Canada that seek them.”<sup>252</sup>

381. Notwithstanding, however, the guarantee of continuity, he stresses that “most importantly, the right of United States firms to establish in Mexico and Canada on a non-discriminatory basis is guaranteed.”<sup>253</sup> The non-discriminatory basis reference in the context of

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<sup>251</sup> Newman testimony, Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred Third Congress, Serial No. 103-71 (September 28, 1993) at 35, C-0032.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

Chapter 14 (Financial Services) is a direct allusion to national treatment and MFN.

382. He is emphatic on dispute resolution as critical to ensuring that national treatment and MFN treatment protection standards will constitute rights with remedies.

383. In part in this connection he observes “[i]n short, the agreement will provide rules that ensure fair trade in financial services throughout North America *and dispute settlement mechanisms to back these rules up.*” (emphasis supplied).<sup>254</sup>

384. Mr. Newman reinforces and further corroborates Mr. Wethington’s testimony that the Treasury Department spearheaded the NAFTA negotiations for which Mr. Wethington was the lead negotiator.

385. In this regard he asserts that “[t]he success of the NAFTA in financial services was due in part to how the chapter was negotiated. The U.S. negotiating team on financial services in the NAFTA was led by the Treasury Department in banking and securities and the Department of Commerce for insurance issues.”<sup>255</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 36.

386. During the hearing the Committee Chairman (Henry B. González<sup>256</sup>) opened a line of inquiry seeking to extract from Mr. Newman more precise testimony on the more salient relative benefits to the NAFTA Parties generally, but to the United States and Mexico in particular.

387. The following exchange between the Chairman and Mr. Newman speaks to the Agreement's objectives and the Parties' intent to have robust *and* enforceable treatment protection standards.

**Mr. Chairman:** There is one question, though, that has been raised not only to me by various members, some of whom have been here during the hearing, and some who have not, and that is that we know and we agree that the financial services market is opened and

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<sup>256</sup> Mr. Henry B. González was a member of the US House of Representatives who served from 1961 to 1999.



already has been opened to Mexican investors and businessmen. On the other hand, the Mexican market has remained largely closed. But now Mexico comes forth and says, hey, look, we are going to open up for the first time, and both sides claim a big boom.

The question is, is there anything in this NAFTA financial agreement that needs to be in NAFTA that Mexico can't do on its own unilaterally? I mean, all they are doing is using NAFTA as a vehicle, and it is what they could do

at any time, so they say.

**Mr. Newman:** Clearly, Mexico believes that it is necessary for it to have an efficient, modern, financial industry if it wishes to become a developed, prosperous country. Certainly, they could take these measures unilaterally. It is, however, extremely difficult to open up your system just in a unilateral action, and it is much easier in the context of a broad agreement such as the NAFTA where you can make an argument, a persuasive argument, that you have a strong national interest

*because you will be getting benefits in other areas as well.*

**Mr. Chairman:** That is it. What is the *quid pro quo*?

**Mr. Newman:** I think an agreement that provides for free trade for Mexico in the United States market and the United States in the Mexican market is seen as providing benefits for everybody rather than an agreement that simply provided for unilateral actions by Mexico in financial services which would be seen as one sided.

**Mr. Chairman:** Well, actually, this is what I have said from the beginning, that the general

consensus is that  
this is a *trade  
agreement*, pure  
and simple, when,  
actually, *I consider  
the locomotive  
driving that  
portion the  
financial and  
securities section  
more than  
anything else.*

But here, again,  
suppose NAFTA is  
not agreed to?  
What is to prevent  
Mexico from doing  
and agreeing to the  
same thing they  
are doing under  
NAFTA  
unilaterally?  
Saying, hey, we  
think it would be  
good for us to open  
up our market and  
we are going to do  
it? And then work  
out some bilateral  
understanding

with the United States since the United States has already indicated its willingness through NAFTA?

**Mr. Newman:**

The benefits that Mexico gets in the *financial services area* – *I can only speak to that* – is the guarantee that the provisions for *national treatment, for transparency and so on and so forth* will apply to them when they are in the United States market. And, in addition, *if we per chance violate those, they have a dispute settlement arrangement where they will be able to redress their grievances for U.S. violations.*

*If they did a NAFTA – a Mexican NAFTA, if you wish – did the Mexican measures, they would not have the guarantees in the United States market, and they would not have a dispute settlement arrangement.*

**Mr. Chairman:** *I think we are touching there on the nub of the matter. Mr. Newman, you mentioned that Mexico thereby will have their institutions able to do business in the United States in a manner, shape, and form that they are not [doing business] now. Am I interpreting that correctly?*

Mr. Newman: *They will have assurances that in the future we will not take discriminatory actions [national treatment protection] against Mexican firms as a result of the NAFTA and that, if we were to do so, they will have a mechanism by which to resolve any disputes.*

(emphasis supplied).<sup>257</sup>

388. Three clear propositions follow from this exchange, among many of course. First, Mr. Newman's response to the *quid pro quo* question is based upon (i) reciprocity of national treatment protection standard, and (ii) the enforceability of that standard through international investor-State arbitration.

389. Second, it is evident that both Mr. Newman and Mr. Chairman are discussing the

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<sup>257</sup> *Id.* at 42-43.

rights of private entities (non-State Parties) to assert any claims arising from discriminatory treatment, i.e., violations of the national treatment standard.

390. Third, it is equally manifest that both Mr. Chairman and Mr. Newman agree that the “nub of the matter,” the central feature that requires a treaty or agreement and that cannot be performed unilaterally without a treaty, or by dint of a mere side-agreement, is the grant of enforceable national treatment protection. The thinking is that both US and Mexican investors would have this protection when investing in a host-State’s Financial Services sector.

391. The testimony further clarifies these points in the context of a hearing dynamics. Specifically, the inquiry addresses the type of regulatory or legislative measure that would trigger the enforcement of the national treatment protection standard.

**Mr. Chairman:** But what would be those handicaps or restrictions that in the future the United States might impose?

**Mr. Newman:** If we were to, for example, expand powers of U.S. institutions could do –



say we were to eliminate Glass-Steagall, per chance, so that banks could do investment banking activities, we could say foreign firms – Mexican firms particularly in the case of NAFTA – would not have those powers. *We would violate the principle of national treatment.*

*Without a NAFTA, Mexico couldn't have a dispute settlement mechanism. With NAFTA, they could.*

(emphasis supplied).<sup>258</sup>

392. Later in the testimony Mr. Newman explains that violations of Financial Services investor protection standards would allow Financial Services investors directly to assert claims for compensatory damages against the host-State.

393. The reference is not to government-to-government arbitration, which in any event does

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<sup>258</sup> *Id.* at 43.

not provide for compensatory damages. Mr. Newman is referring to pecuniary damages in the context of ISDS and also in the context of Chapter 14 protection standards.

394. Speaking again as to US financial institutions, i.e., Financial Services investors, Mr. Newman testifies:

Aside from the basic financial services rules, the NAFTA also contains a number of very important investment protections for U.S. financial firms. For example, NAFTA investments in financial institutions cannot be subject to unreasonable expropriation by another NAFTA country.

In addition, a NAFTA country is not permitted to restrict the transfer of profits out of its territory except for prudential reasons. *Any violation of an investment protection will permit an investor to bring a direct action against the offending NAFTA country for the financial harm caused by the violation.* (emphasis supplied).<sup>259</sup>

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<sup>259</sup> *Id.* at 109.

395. The witnesses all agree on the primacy of enforceable national treatment and MFN treatment protection standards in Chapter 14.

**i. Relevance of the Transcript of the Hearings before the House Committee on Banking, Finance, and Urban Affairs on September 28, 1993**

396. The transcript of the hearing held before the House Committee on September 28, 1993 concerning the NAFTA Chapter 14 (Financial Services), could not be any clearer.

397. The national treatment and MFN treatment protection standards of Chapter 14 of the NAFTA were deemed to be two of the three most important features of that Chapter. The third was the enforceability of those rights on the part of investors against host-States for financial harm alleged to have been suffered as a result of an averred violation of a treatment protection standard.

398. As Mr. Ira Shapiro, General Counsel to the Office of the U.S. Trade Representative of the United States testified, “*we haven’t put our faith in the Mexican court system. There are a number of*

*provisions in NAFTA by which arbitral panels that are not the court system adjudicate disputes.”*<sup>260</sup>

399. Thus, having enforceable rights, and not rights without remedies as Respondent invites this Tribunal to reason, was critical to the NAFTA negotiators with respect to the Financial Services Chapter of that Agreement. It, therefore, and necessarily, is central to the TPA in this case to construe Chapter 12 treatment protection standards that are enforceable pursuant to investor-State arbitration, rather than substantive lingering rights provided to investors but not all enforceable by them.

**e. The Republic of Colombia Accepted the NAFTA as a Template for the TPA**

400. The United States and Colombia consented to having a Financial Services Chapter that would have enforceable substantive protections for this vulnerable class of investors. Those enforceable rights included national treatment (Art. 12.2), and MFN (Art. 12.3).

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<sup>260</sup> Shapiro testimony, Hearing before the Committee on Banking, Finance and Urban Affairs, House of Representatives, One Hundred Third Congress, Serial No. 103-71 (September 28, 1993) at 45. C-0032.

401. The testimony before the Committee manifestly speaks of the NAFTA as a template for other trade protection agreements throughout Latin America.<sup>261</sup> Such was the case here.

402. Chapter 12 of the TPA is completely and verbatim based on Chapter 14 of the NAFTA. This fact is not in dispute. It cannot be. The Respondent's, i.e., Republic of Colombia's, negotiators accepted and did not renegotiate any material term contained in Chapter 14 of the NAFTA in arriving at Chapter 12 of the TPA.<sup>262</sup>

403. Respondent's negotiating team did not negotiate any significant differences between Chapter 11 (Investment) of the NAFTA and Chapter 10 (Investment) of the TPA. The most significant difference between Chapter 10 of the TPA and Chapter 11 of the NAFTA is that Art. 10.4 (Most-Favored-Nation Treatment) of the TPA contains the Footnote 2 qualification.<sup>263</sup>

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<sup>261</sup> See also *Report of the Services Policy Advisory Committee (SPAC) on The North American Free Trade Agreement*, (September 1992). At 60. C-0033.

<sup>262</sup> See Claimant's Exhibit C-0036 illustrating differences and commonality between Chapter 14 (Financial Services) and Chapter 12 (Financial Services) TPA.

<sup>263</sup> See Claimant's Exhibit C-0037 illustrating differences and commonality between Chapter 10 (Investment) of the and Chapter 11 (Investment) TPA.

404. Because the Respondent's negotiators adopted Chapter 14 directly from the NAFTA, Mr. Wethington's testimony as the lead United States negotiator for Chapter 14 of the NAFTA represents substantial, if not the best, evidence of the Parties' objective with respect to that Chapter, as well as the Chapter's purpose and context. Hence, his testimony derivatively applies to Chapter 12 of the TPA.

405. The transcript of the testimony on the Financial Services Chapter 14 of the NAFTA represents the best supplementary evidence (after the text and structure of the agreement itself) of the negotiating context, purpose, and intent of the agreement with respect to the (i) primacy, (ii) application, (iii) scope, and (iv) enforceability of national treatment and the MFN treatment protection standards in Chapter 14 of the NAFTA and, derivatively, Chapter 12 of the TPA.

406. Mr. Wethington's testimony is unique and material supplementary evidence of the

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For greater certainty, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided in international investment treaties or trade agreements.

negotiating context, purpose, and intent with respect to the (i) primacy, (ii) application, (iii) scope, and (iv) enforceability of the national treatment and the MFN treatment protection standards in Chapter 14 of the NAFTA and, derivatively, Chapter 12 of the TPA.

407. The plain language, negotiating context, purpose, and intent of the Parties all compellingly establish that Colombia and the United States consented to providing Financial Services investors with the right to arbitrate Art. 12.2 (National Treatment) and such other protection standards as would have complied with the configuration and scope of Art. 12.3 (MFN). The intent and the practical functionality of Art. 12.2 (National Treatment) in Chapter 12 is precisely to provide for an enforceable treatment protection standard that would be subject to investor-State arbitration pursuant to the incorporation of Section B of Chapter 10 into Chapter 12.

408. To conclude otherwise is to endorse a right without a remedy, as well as to reject textual and contextual evidence, evidence of treaty practice, and testimonial evidence in the form of the TPA's objective, history, and context suggesting otherwise. It would be tantamount to ascribing only an aesthetic value to the presence of Art. 12.2 (National Treatment) within the workings of the

entire TPA generally, and Chapter 12 in particular. The Parties also consented to a fulsome and expansive Art. 12.3 (MFN) treatment protection standard.

409. Respondent invites the Tribunal to carve out of Chapter 12 any such protections, in part, by denying investors the right to enforce these treatment protection standards that are central to the workings of Chapter 12.

**f. The September 1992 Report  
of the Services Policy  
Advisory Committee for  
Trade on the North  
American Free Trade  
Agreement**

410. As fleetingly referenced in *supra* note 123, the Service Policy Advisory Committee (SPAC),<sup>264</sup> in September 1992 authored a report (“the SPAC report”) on the NAFTA. The SPAC further corroborates the primacy of an enforceable national treatment protection standard in Chapter 14 of the NAFTA. It similarly corroborates Mr.

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<sup>264</sup> The (SPAC) is a private sector advisory committee that provides advice to the USTR and the Administration. It operates independent of USTR. Membership on the SPAC is private sector and approved by the White House from names proposed by USTR and the White House Office of Presidential Personnel. The paper is the opinion of the SPAC concerning NAFTA.



Wethington's testimony that the NAFTA was to serve as a template for other agreements and treaties throughout Latin America and beyond, thus substantiating the NAFTA's status as *bona fide* working papers in relation to the TPA:

*Among developing countries national treatment is more the exception than the rule, which makes the NAFTA all the more significant. Indeed, SPAC expects that the general approach to the handling of services in the NAFTA will serve as a model for other bilateral and multilateral trade agreements. Once having achieved this kind of real breakthrough, SPAC sees the NAFTA provisions as the starting point and model for all future trade negotiations.*<sup>265</sup>

411. Along these lines, the SPAC report also notes:

... the successful negotiation of the NAFTA will set useful precedents for other negotiations such as those contemplated under the Enterprise for the Americans Initiative as well as the

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<sup>265</sup> *Report of the Services Policy Advisory Committee (SPAC) on The North American Free Trade Agreement*, (September 1992) at 2. C-0033.

GATT and perhaps other bilateral and/or multilateral trade negotiations. In a very real sense, services have now become a sine qua non of trade negotiations because of NAFTA's *strong and broad* provisions concerning trade in services.<sup>266</sup>

(emphasis supplied, underline in original)

412. The SPAC report emphasizes the exportation of the national treatment standard of protection to Mexico as a core foundational feature of the NAFTA. It is very evident from the SPAC report's language, as with the testimony before the House Committee, that the national treatment standard was viewed as a mainstay enforceable treatment protection standard:

Historically United States providers of services in general whether financial services, professional services, lodging services, and all other services have been severely hampered by Mexican rules and practices. Without a NAFTA the US has been strictly limited in the provision of services in Mexico. *National treatment has not been a generally recognized principle in*

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<sup>266</sup> *Id.* at 5.

*Mexico vis-à-vis US service providers and usually a commercial presence was required as a condition for providing services in Mexico.*

In a historical breakthrough, these barriers will be largely removed for most US services by NAFTA. *National treatment is provided for all US services providers in Mexico except for those services specifically exempted. Also, the 'right of establishment' is guaranteed under the NAFTA under the same conditions as well as the right to sell most services across the border without first establishing a commercial presence in Mexico.* Again, this applies to all US service providers except those specifically exempted.

#### SPECIFIC ASSESSMENT OF CERTAIN RELEVANT NAFTA PROVISIONS

The services and investment chapters of the NAFTA outline the principles of how service businesses will be treated when their operations cross the national borders of the three countries. They cover both commercial presence within other NAFTA signatories'

markets and the cross-border provision of services without a commercial presence in the customers market. *The guiding principle is 'national treatment' which is the principle that foreign operations should be treated the same as or no less favorable than, similar domestic operations. While perhaps seeming obvious achieving 'national treatment' among Mexico [sic] Canada and the United States for most services is in itself a major achievement.* This is also true of the 'right of establishment' provided for service sector firms in the NAFTA.

(emphasis supplied).<sup>267</sup>

413. The SPAC report reiterates with even greater specificity the importance of an enforceable national treatment standard provided to Financial Services investors with respect to Banking and Securities. It notes that the NAFTA "will provide phased-in access to the virtually closed Mexican market for both U.S. and Canadian banks and *full national treatment within that market.*"<sup>268</sup>

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<sup>267</sup> *Id.* at 6-7. (emphasis supplied).

<sup>268</sup> *Id.* at 9. (emphasis supplied)

414. Likewise, the SPAC report underscores that “[n]ational treatment will be assured securities firms operating in Mexico.” This observation comports with the SPAC report’s narrative on institutional arrangements and dispute settlement procedures. (emphasis supplied).<sup>269</sup>

415. It provides, in part, that “NAFTA, in a major breakthrough, protects investors’ rights through a dispute settlement mechanism that *permits investors to go directly to international arbitration for disputes with host government*. NAFTA also strengthens the procedures for obtaining binding awards of money damages and enforcement of those decisions.” (emphasis supplied).<sup>270</sup>

416. As with the history of the NAFTA provided for in the transcript of testimony before the House Committee, the SPAC report emphasizes the objective to provide an enforceable national treatment protection standard that would allow Financial Services investors the opportunity to secure compensatory damages against a host-State.

417. Respondent’s challenge to consent on the basis of its unique interpretation of Art.

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<sup>269</sup> *Id.* at 11.

<sup>270</sup> *Id.* at 16-17.

12.1.2(b) simply does not resist sustained analysis. Colombia and the United States consented to provide Financial Services investors with enforceable Arts. 12.2 (National Treatment) and 12.3 (MFN) treatment protection standards that would be enforceable.

418. The Counter Memorial cites to no authority that would proscribe exercise of Art. 12.3 (MFN) from importing a five-year limitations period from Art. 11(5) of the Colombia-Switzerland BIT. Likewise, Respondent offers no authority or other normative premise that may characterize the exercise of Art. 12.3 (MFN) to enhance the applicable limitations period from three to five years as anything other than engrafting more favorable terms to an existing right.

419. Indeed, the cases on which Respondent relies are the usual awards that correctly stand for the rudimentary proposition that MFN practice must avoid explicitly circumventing jurisdictional restrictions to import and create rights where none existed. Claimant submits that this authority is inapposite.

420. In a similar “cut and paste” approach, Respondent references the tried and true awards that correctly and understandably teach that MFN practice must not lead to the rewriting or substitution of a narrow dispute settlement clause

for a broader one. Here too, Claimant agrees with the proposition asserted, but add that it has no application to the importation of a more favorable limitations period under the facts of this case, as more fully discussed below.

421. Finally, as is the case throughout Respondent's entire Counter Memorial, Respondent ignores that any MFN analysis in this proceeding must consider the context and actual text of the MFN provision in question. In this regard, Respondent ignores that Art. 12.3 (MFN) (i) is contextualized in the Financial Services Chapter of a TPA, and (ii) is distinct from its Investment Chapter counterpart (Art. 10.4) in ways that command an expansive construction of its scope and content.

422. Put simply, Respondent's analyses are very generic and do not engage in the requisite consideration of the particular features of the (i) TPA, (ii) the specific language of Art. 12.3 (MFN), (iii) the context of Art. 12.3 (MFN) in a Financial Services Chapter, or (iv) the workings of the Chapter 10 ISDS provision in the context of Chapter 12. Respondent's approach consistently is not different from one that (i) transfers the Financial Services investors to Chapter 10 (Investment), (ii) subjects them to Art. 10.4 with its respective Footnote 2, (iii) provides the Financial Services investors with only two enforceable

protection standards (Articles 10.7 [Expropriation] and 10.8 [Transfers]), and (iv) eviscerates any consideration of Chapter 12. This approach is simply untenable, notwithstanding its didactic value.

**D. The Vast Majority of Arbitral Awards on the Subject Support and Encourage the Importation of Procedural Rights Pursuant to an MFN Clause**

**1. Respondent Offers no Response to the Cases on Which Claimant Relies**

423. Respondent’s analysis of dispositive arbitral awards is inextricably tied to its interpretive theory. Because Respondent opines that Chapter 12 protection standards are proscribed from enforcement by Financial Services investors, Respondent reasons that “[t]he incorporation of a dispute resolution mechanism through the Chapter 12 MFN Clause would be contrary to the express terms of the TPA.”<sup>271</sup> Along this same line of thought, Respondent asserts that “[a]llowing Claimant to rely upon the Chapter 12 MFN Clause to bring claims for alleged breaches of protection that are not listed in 12.1.2(b) would – contrary to well established principles of treaty

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<sup>271</sup> Respondent’s Counter-Memorial on Jurisdiction¶ 332.



interpretation – deprive that provision of *effet utile*.”<sup>272</sup>

424. Based on this reasoning and asserting that the UK- Czech BIT presents a “similar [situation],” Respondent relies heavily on *A11Y LTD v. Czech Republic*<sup>273</sup> for the proposition that under such circumstances “MFN clauses do not create consent.”<sup>274</sup>

425. Respondent’s reliance on *A11Y LTD v. Czech Republic* is fundamentally flawed. Indeed, Claimant encourages the Tribunal to consult *A11Y LTD* with considerable care. It furthers the proposition that Claimant’s use of Art. 12.3 MFN in this matter is appropriate and in keeping with the Parties’ consent.

426. There are five reasons why Respondent’s reliance on *A11Y LTD* is misplaced. As a predicate to any analysis, however, it should first be observed that in *A11Y LTD* the Tribunal found that there was consent and that it properly had jurisdiction over all of the substantive protection standards contained in the dispute

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<sup>272</sup> Respondent’s Counter-Memorial on Jurisdiction¶ 333 [citations omitted].

<sup>273</sup> *A11Y LTD v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction (February 9, 2017).

<sup>274</sup> Respondent’s Counter-Memorial on Jurisdiction¶ 334.

resolution clause of the BIT, Art. 8. The Tribunal concluded that “[i]n summary, the Tribunal held that it has jurisdiction over alleged violations of Articles 2(3), (4), (5) and (6) of the Treaty but not over violations of other Articles of the Treaty.”<sup>275</sup> Notably, at issue is the scope of consent.

427. First, in Art. 12.1.2(b), Section B of Chapter 10 is imported into Chapter 12 and in this regard made available to Financial Services investors. Moreover, Art. 12.1.2 only limits the Chapter 10 substantive provisions that are made available to this particular class of investors.

428. In *AIY LTD* the dispute settlement provision at issue (Art. 8 of the UK-Czech BIT) purported to list, and in fact listed, all of the actionable provisions under the BIT.<sup>276</sup>

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<sup>275</sup> *AIY LTD*, ¶ 90.

<sup>276</sup> The settlement dispute provision at issue under the UK-Czech BIT, Art. 8(1) reads:

- (1) Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), (4), (5) and (6) of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either Party to the dispute so wishes.

429. Second, the importation of a five-year limitations period from the Colombia-Switzerland BIT differs materially from the MFN practice at issue in *ALLY LTD*. There, the Claimant sought in effect to create an entire new universe of enforceable obligations that under no reasonable hypothesis of fact, law, or logic could be reconciled with the dispute settlement provision (Art. 8(1)) of the operative UK-Czech BIT.

430. The very plain meaning of Art. 8 of the UK-Czech BIT is not susceptible to any interpretation other than that the ISDS procedural rights are applicable to the four specific treatment protection standards identified in that BIT. The importation of the counterpart provision from the Netherlands-Czech BIT would be akin to rewriting and expanding Art. 8(1) by adding to the list of actionable treatment protection standards rather than merely exercising MFN practice to acquire more favorable conditions of already established rights to arbitrate under the Treaty. Such is not the case.

431. The configuration of Art. 12.1.2(b) is materially different from Art. 8 of the UK-Czech BIT. Moreover, the exercise of Art. 12.3 (MFN) to import a five-year versus a three-year limitations period from the Colombia-Switzerland BIT is simply not analogous to substituting the entire Art. 8 dispute resolution provision contained in the UK-

Czech BIT with the counterpart dispute resolution clause set forth in the Netherlands-Czech treaty.

432. Third, even assuming and adopting merely hypothetically for the sake of argument Respondent's problematic interpretation of Art. 12.1.2(b), the reasoning and holding of *A11Y LTD* still would not compel a finding that there is no consent. Applying *A11Y LTD*'s analysis under this hypothetical scenario would exclude importation of fair and equitable treatment from the Colombia-Switzerland BIT, but there would still be consent to arbitrate Art. 10.7 (Expropriation and Compensation) as set forth in Art. 12.1.2(b).

433. Fourth, of particular interest is the *A11Y LTD* Tribunal's reasoning concerning the exercise of MFN clauses to import procedural dispute settlement provisions. The Tribunal observed:

97. A review of arbitral decisions on the issue of the scope of the MFN clause reveals that, where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used

in the applicable Treaty. This is consistent with the ILC Study Group's conclusion that *'dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision.'*

(emphasis in original).<sup>277</sup>

434. The *A11Y LTD* Tribunal aligns itself with the authority holding, in any event, that save where an MFN provision is expressly restricted, as in the case of Art. 10.4, MFN practice provides for the importation of procedural rights.

435. Fifth and finally, even when *A11Y LTD* is construed in the light most favorable to Respondent, which it should not, consent to arbitrate expropriation is present because the inclusion of a five-year limitations period hardly can be characterized as the creation of new rights such that an MFN clause would have been "invoked to override public policy considerations."<sup>278</sup>

436. Respondent similarly places considerable emphasis on *European American Investment Bank AG (Austria) (EURAM) v. Slovak*

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<sup>277</sup> Citing to the International Law Commission Final Report on the Study Group of the Most-Favoured-Nation Clause, CL-0126.

<sup>278</sup> *A11Y LTD*, ¶ 97.

*Republic*.<sup>279</sup> In this case, as with *AIY LTD*, at issue is the exercise of MFN practice that seeks altogether to eviscerate and supplant a dispute resolution clause that plainly applies to only two treatment standards of protection.

437. Specifically, Claimant in *EURAM* sought to circumvent the limited procedural rights provided for in the dispute settlement clause of the Austria-Czech-Slovak BIT. Claimant engaged in MFN practice to “supplement” those circumscribed rights by importing the unfettered ISDS “[a]ny dispute” scope from the dispute settlement provisions contained in the Hungary-Slovak, and the Slovak-Croatia BITs.<sup>280</sup>

438. After carefully canvassing the contours of arbitral awards addressing the extent to which an MFN clause may affect a dispute settlement provision, the Tribunal observed that arbitral awards are less than consistent in both their findings and *ratio decidendi*. It further noted that “[w]hile the Tribunal has drawn on the reasoning in the various awards where appropriate,

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<sup>279</sup> European American Investment Bank AG (Austria) (*EURAM*) v. Slovak Republic, PCA No. 2010-17 (Award on Jurisdiction) (October 22, 2012).

<sup>280</sup> Both of these treaties contained unbridled dispute settlement provisions covering “[a]ny dispute” between the parties. The facts of the proceeding before this Tribunal are different.

it has not felt compelled to follow any particular line of awards.”<sup>281</sup>

439. The Tribunal engaged in a three-prong analysis. First, it reasoned that because the MFN clause at issue “is located in the group of substantive provisions and worded in the same way as other substantive provisions ... it was not intended to be capable of transforming the scope and extent of the investor-State arbitration provision.”<sup>282</sup>

440. Second, it further found analytical support in the *travaux préparatoires* of the MFN and dispute settlement provisions, and concluded that the State Parties “did not intend the [MFN] provision to have the potential for transforming the scope of the [dispute settlement clause].”<sup>283</sup>

441. Third, and finally, weight was accorded to Claimant’s failure “to establish that the Parties intended to adopt a MFN provision capable of expanding the scope of their agreement on investor-State arbitration – is that the *travaux* lent

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<sup>281</sup> *EURAM*, ¶ 437.

<sup>282</sup> *Id.* ¶ 452.

<sup>283</sup> *Id.* ¶ 454.

no support to the interpretation at best by the Claimant.”<sup>284</sup>

442. The Art. 8 dispute settlement provision contained in the Austria-Czech-Slovak BIT is structurally different from Art. 12.1.2(b). It plainly limits the enforcement of treatment protection standards to transfers and expropriation. In that case there was no separate and distinct Chapter structure into which rights and obligations were being imported. Likewise, at issue was not an MFN provision separate and distinct from a counterpart provision in an Investment Chapter. The analysis in *EURAM* understandably takes place in connection with a very standard BIT structure.

443. It is poles apart from Art. 12.1.2(b), which is a scope provision that incorporates substantive standards of protection from an Investment Chapter into a Financial Services Chapter that lacked such provisions.

444. Here as well, even where Respondent’s construction of Art. 12.1.2(b) is assumed, the *EURAM* decision fails to explain how the importation of a five-year limitations period from the Colombia-Switzerland BIT would at all “transform” Art. 12.1.2(b) in any way analogous to

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<sup>284</sup> *Id.*



what would have been the absolute transformation of the scope of the dispute settlement provision of the Austria-Czech-Slovak BIT from rendering enforceable two protection standards to a virtually unbridled position encompassing “any dispute” without qualification. Also, the MFN clause in *EURAM* was not in a separate Financial Services Chapter or comparable treaty structure in furtherance of the protection of a distinct class of investors separate from all other investors.

445. As with the analysis in *A11Y LTD*, even where Respondent’s analysis is verbatim adopted, the Art. 10.7 (Expropriation and Compensation) provision incorporated into Art. 12.1.2(b) survives and demonstrates at minimum the Parties’ consent to arbitrate that claim.

446. Respondent’s reliance on *ST-AD GmbH v. Republic of Bulgaria*<sup>285</sup> does not provide any conceptual clarity or juridical support. That case, much like *A11Y LTD* and *EURAM*, also concerns a restrictive dispute resolution clause in a standard BIT structure. There at issue was the interpretation of Art. 4(3) of the Germany-Bulgaria BIT. The Germany-Bulgaria BIT only provides for

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<sup>285</sup> *ST-AD GmbH v. Republic of Bulgaria*, (UNCITRAL), PCA Case No. 2011-06 (Award on Jurisdiction) (July 18, 2013), CL-0286.

ISDS in connection with one treatment protection standard: expropriation.<sup>286</sup>

447. Understanding that “the object and purpose of the BIT did not require ‘either a broad or restrictive approach to the interpretation of its provisions for arbitration,’”<sup>287</sup> the Tribunal correctly reasoned that there was *no plain language analysis or other evidence* suggesting “the application or non-application of the MFN clause to the dispute settlement mechanism.”<sup>288</sup>

448. In analyzing Art. 4(5), the MFN clause at issue, the Tribunal placed considerable weight to the words “treatment in the *territory* of the other Contracting Party.” (emphasis supplied). It concluded that such language “cannot be reconciled

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<sup>286</sup> Article 4(3) in pertinent part reads:

If agreement has not been reached within three months from the commencement of the consultations, *the amount of the compensation shall*, at the request of the investor, be reviewed either in a properly constituted proceeding of the Contracting Party that has carried the expropriation measure, *or by means of an international arbitral tribunal*.

(emphasis supplied).

<sup>287</sup> ST-AD GmbH v. Republic of Bulgaria, (UNCITRAL), PCA Case No. 2011-06 (Award on Jurisdiction) (July 18, 2013) at 384, CL-0286.

<sup>288</sup> *Id.* at 392.

with an international arbitral procedure, which is not rooted in the territory.”<sup>289</sup> (emphasis supplied). Understandably, the Tribunal reasoned that the Parties only consented to arbitrating the issue of compensation arising from expropriation and that similarly, those procedural rights could not be expanded by dint of a correspondingly narrow MFN clause. There is no comparable qualification to the word “treatment” within the meaning of Art. 12.3 (MFN).

449. The authority that Respondent cites to is extremely helpful. The Tribunals in *ALLY LTD*, *EURAM*, and *STAD* are all in unison on rejecting an aprioristic view of the extent to which procedural rights to arbitrate may be affected by an MFN clause. This common denominator shared by this authority is analytically sound and of immediate practical application to the proceeding before the Tribunal.

450. These three Tribunals focused on the particular language, context, and object of the corresponding dispute settlement provision and MFN clause. Moreover, all three Tribunals acknowledged that there is no monolithic or

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<sup>289</sup> *Id.* at 394.

“*constante*” jurisprudence that referentially may serve as a gateway litmus test on this issue.<sup>290</sup>

451. This observation is particularly relevant here because the Art. 12.3 (MFN) provision is contained in the Financial Services Chapter of a TPA. As previously stated, this issue is one of first impression. Similarly, the workings of the Art. 12.1.2(b) scope provision in relation to both Chapters 10 and 12 of the TPA presents an issue of first impression with respect to which testimony and other evidence has been proffered. Respondent’s generic recitation of authority glosses over these considerations, as does virtually the entirety of the Answer.

452. The corresponding analysis here, as the Tribunal is fully aware, necessarily shall have to consider the Parties’ intent and the objectives of the TPA and Chapter 12 by scrutinizing the ordinary meaning and restrictions, and lack thereof attendant to the MFN clauses in Chapter 10 (Art. 10.4 and Footnote 1), in *pari materia* with the Chapter 12 MFN provision (Art. 12.3). Also, the

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<sup>290</sup> See *A11Y LTD v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction (February 9, 2017); *European American Investment Bank AG (Austria) (EURAM) v. Slovak Republic*, PCA No. 2010-17 (Award on Jurisdiction) (October 22, 2012); and *ST-AD GmbH v. Republic of Bulgaria*, (UNCITRAL), PCA Case No. 2011-06 (Award on Jurisdiction) (July 18, 2013), CL-0286.

Parties' treaty practice in qualifying rights and obligations within the TPA and beyond, together with the TPA's purpose and objectives must be considered. The witness statement and supplemental witness statement of Mr. Olin Wethington provides both expert opinion and factual testimony as to the Parties' intent, the objectives, of Chapter 12, and surrounding context with respect to the NAFTA.

453. In addition, the *AIY LTD* Tribunal's analysis is particularly helpful because in that proceeding, although Claimant's argument to expand the dispute resolution settlement provision rightfully was not accepted under the facts of that case, the Tribunal still found that the Parties had consented to arbitrating the four claims contained in the UK-Czech BIT. As previously referenced, even adopting Respondent's views on the scope and application of Arts. 12.1.2(b), 12.2 (National Treatment), and 12.3 (MFN), consent to arbitrate expropriation and compensation pursuant to the incorporation of Art. 10.7 into Art. 12.1.2(b), would still be present.

454. Therefore, even where for the sake of argument Respondent's interpretive theory is adopted, at issue would only be the *scope of consent* and not whether there is consent at all, as was the case in *AIY LTD*. Pursuant to this specific context, Respondent not only ignores clear consent even

under the umbrella of its own arguments, but also fails to demonstrate the manner in which the exercise of Art. 12.3 (MFN) to import procedural and other rights from the Colombia-Switzerland BIT and increase the limitations period from three to five years is but the legitimate exercise of the MFN provision to import more favorable conditions pertaining to existing rights. It is hardly an effort to frustrate the Parties' consent through the importation of rights for which there could not have been consent because such rights did not exist.

**E. Respondent Conflates the Importation of Procedural Rights with the Exercise of an MFN Clause to Create Consent**

455. Respondent summarily dismisses six of the eleven cases on which Claimant relies on the ground that “those cases involved Claimant’s attempts to import more favorable dispute resolution clauses from other treaties.” The remaining five cases simply are ignored. This argument further asserts that “[i]n all six cases, the dispute resolution clause in the underlying treaty already provided consent to arbitration for the *types of claims* being submitted, and the Claimants merely sought to override less favorable *conditions* to arbitration in the underlying treaty,” which Respondent identifies as “the requirement that the claimant first submitted its claims to local courts,

before pursuing international arbitration.”<sup>291</sup> Respondent then characterizes the importation of procedural rights in these cases as an MFN practice with respect to which “none of the six cases cited by Claimant were the claimants seeking to import *consent* to arbitration.”<sup>292</sup>

456. Respondent’s analysis is misplaced for two fundamental reasons. First, Respondent mistakenly assumes that Art. 12.1.2(b) renders unenforceable all of the Financial Services investor protection standards in Chapter 12. Hence, Respondent concludes that Art. 12.2 (National

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<sup>291</sup> See Respondent’s Counter-Memorial on Jurisdiction ¶ 347, n. 721, which provides:

See Claimant’s Memorial (ICSID), ¶¶ 209–244 (citing **CL-0030**, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Orrego Vicuña, Buergenthal, Wolf), Decision on Jurisdiction, 25 January 2000 (“**Maffezini Decision on Jurisdiction**”); **CL-0074**, *Siemens* (Decision on Jurisdiction); **CL-0049**, *National Grid, PLC v. Argentine Republic*, UNCITRAL (Rigo Sureda, Debevoise Garro), Decision on Jurisdiction, 20 June 2006 (“**National Grid Decision on Jurisdiction**”); **CL-0079**, *Suez*, (Decision on Jurisdiction); **CL-0008**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Danelius, Brower, Stern), Award, 21 June 2011 (“**Impregilo-Argentina**”).

(emphasis in original).

<sup>292</sup> *Id.* (emphasis in original).

Treatment) and other provisions in Chapter 12 (Financial Services) are not subject to Section B as incorporated into Chapter 12 by dint of Art. 12.1.2(b).

**i. Fair and Equitable Treatment is a Core Chapter 12 Obligation**

457. Also, pursuant to Respondent's analysis, the exercise of using Art. 12.3 (MFN) to import fair and equitable treatment from the Colombia-Switzerland BIT runs afoul of the restrictive scope of Art. 12.1.2(b), which under Respondent's construction only accords Financial Services investors with two protection standards: Arts. 10.7 (Expropriation and Compensation), and 10.8 (Transfers).

458. The proposition that exercising Art. 12.3 (MFN) to import fair and equitable treatment from Article 4(2) of the Colombia-Switzerland BIT is the fabrication of a non-existing right rather than the enhancement of existing substantive provisions and protection standards, simply carves out of the TPA the entirety of Chapter 12. As already detailed, Chapter 12 is laced with protection standards akin to *both* the customary international law and the conventional international law iterations of the Fair and Equitable Treatment ("FET") protection standard.



459. Four articles are particularly noteworthy in this regard: Articles 12.4 (Market Access for Financial Institutions), 12.5 (Cross-Border Trade), 12.10(4) (Exceptions), and 12.11 (Transparency and Administration of Certain Measures). All four of these provisions command treatment conceptually indistinguishable from FET. These provisions infuse Chapter 12 with substantive protection obligations on the contracting Parties that create corresponding rights held by Financial Services investors. The four provisions are founded on *non-discriminatory*, *good faith*, and *equitable treatment* of Financial Services investors and investments.

460. Indeed, even a superficial reading of these provisions demonstrates that they supply Financial Services investors with rights that directly comport with the technical workings and content of FET. Article 12.11 (Transparency and Administration of Certain Measures), by way of example only, is aimed at providing investors with the right to have expectations fulfilled and met through the principle of transparency, and an administrative right to have market establishment rights duly processed.

461. The Art. 12.10 (Exceptions) provision is rife with references to “*the equitable, non-discriminatory, and good faith application of measures relating to maintenance of the safety,*

*soundness, integrity, or financial responsibility of financial institutions or cross-border financial service suppliers.*<sup>293</sup> (emphasis supplied) These standards evidence obligations that the contracting Parties agreed and consented to honor.

462. Similarly, Art. 12.11.2 and 12.11.4 directly speak to the application of “non-discriminatory measures of general application,”<sup>294</sup>

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<sup>293</sup> Article 12.10.3 reads:

Notwithstanding Articles 10.8 (Transfers) and 11.10 (Transfers and Payments), as incorporated into this Chapter, a Party may prevent or limit transfers by a financial institution or cross-border financial service supplier to, or for the benefit of, an affiliate of or person related to such institution or supplier, *through the equitable, non-discriminatory, and good faith application of measures relating to maintenance of the safety, soundness, integrity, or financial responsibility of financial institutions or cross-border financial service suppliers. This paragraph does not prejudice any other provision of this Agreement that permits a Party to restrict transfers.*

(emphasis supplied).

<sup>294</sup> Article 12.10.2 reads:

Nothing in this Chapter or Chapter Ten (Investment), Fourteen (Telecommunications), or Fifteen (Electronic-Commerce), including specifically Article 14.6 (Relationship to Other Chapters), and 11.1 (Scope and Coverage)

and “to the requirement that [other measures] not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination”.<sup>295</sup>

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with respect to the supply of financial services in the territory of a Party by covered investment, *applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit or exchange rate policies*. This paragraph shall not affect a Party’s obligations under Article 10.9 (Performance Requirements) with respect to measures covered by Chapter Ten (Investment) or under Article 10.8 (Transfers) or 11.10 (Transfers and Payments.)

(emphasis supplied).

<sup>295</sup> Article 12.10.4 reads:

For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, *subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination* between countries where like conditions prevail, or a disguised restriction on investment in financial institutions or cross-border trade in financial services.

463. The importation of FET is hardly the incorporation of non-existing rights that would violate the Parties' consent. The four articles here referenced illustrate that the Parties consented to establishing rights very much akin to FET such that the importation of this specific treatment protection standard from Article 4(2) of the Colombia-Switzerland BIT is but a more favorable enhancement of already existing premises comprising Chapter 12.

464. Second, Respondent's characterization of the six cases at issue as merely seeking "to override less favorable *conditions*"<sup>296</sup> pursuant to the importation of less onerous jurisdictional predicates, ignores that Claimant's principal objective in exercising Art. 12.3 (MFN) is to draw from the Colombia-Switzerland BIT a five-year limitations period.

465. Respondent's own application of the words "to import *consent* to arbitration" is just as inimical to the use of Art. 12.3 (MFN) to secure a five rather than a three-year limitations period, as it is to the importation of a dispute settlement provision from another treaty that does not require a specific exhaustion of remedy. Within an MFN framework generally, and certainly in the context of

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<sup>296</sup> Respondent's Counter-Memorial on Jurisdiction ¶ 347. (emphasis in original).

the particularities attendant to Art. 12.3 (MFN), there is no material or conceptual difference.

466. For the sake of completeness, Respondent itself acknowledges that even under its reading of Art. 12.1.2(b), consent to arbitrate on the part of Financial Services investors cannot be disputed because Art. 10.7 is covered by Section B within the Art. 12.1.2(b) framework.

### **1. Respondent Ignores Vast Authority Analyzing the Term “Treatment” as a Self-Contained Standard**

467. Respondent dedicated a considerable part of its *ratione voluntatis* written presentation to Tribunal award analysis in an effort to substantiate the proposition that somehow Art. 12.3 (MFN) is being used “to import consent” by rewriting Art. 12.1.2(b).<sup>297</sup> In doing so Respondent

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<sup>297</sup> *Id.* ¶¶ 324-354. By way of example, Respondent asserts that “[c]laimant invokes the Chapter 12 MFN Clause (i.e., Art. 12.3) in an attempt to overcome the jurisdictional limitations that exclude from arbitration her national treatment and fair and equitable treatment claims under the TPA.” *Id.* ¶ 324; “Colombia demonstrates that: a) Claimant cannot use the Chapter 12 MFN Clause to create otherwise non-existent consent to arbitrate claims based on the national treatment and fair and equitable treatment provisions of the TPA [citation omitted]; and b) Claimant cannot rely on the Chapter 12 MFN Clause to submit claims based on the fair and equitable treatment and expropriation provisions of the Colombia-Switzerland BIT [citation omitted]” *Id.* ¶ 326 and

ignores the very basic proposition that a majority of arbitral awards interpreting the unqualified “treatment” terminology in MFN clauses allow for the use of MFN treatment to import procedural rights.<sup>298</sup>

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citing to *Hochtief v. Argentina* for the proposition that “the MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that actually secured by the BIT in which the MFN clause is found.” *Id.* ¶ 327, 342, citing to *Hochtief v. Argentina* (Decision on Jurisdiction), ¶ 81.

<sup>298</sup> For the sake of completeness it should be noted that pursuant to the national domestic law of the Republic of Colombia, a limitations period is deemed to be neither procedural nor substantive. It quite correctly falls, under their jurisprudence, in a third hybrid category that the limitations period itself defines. The Constitutional Supreme Court of Colombia has asserted that “the limitations period is in itself an institution that cannot be precisely classified as falling under either one of these two camps: substantive law or procedural law. Therefore, there is no conflict between Article 2539 of the *Civil Code* and Article 90 of the *Civil Code of Procedure*.” Constitutional Court of the Republic of Colombia, Sentencia No. C-543/93.

The Spanish language original reads:

La prescripción se estructura o integra dentro del proceso. Es claro que no invade el derecho procesal una esfera ajena, cuando reglamenta asuntos atinentes a la prescripción, que ocurren dentro del proceso. Pues, como se ve, la prescripción es institución que no puede encuadrarse exclusivamente en uno de estos dos campos: el correspondiente al derecho

468. The Tribunals in *Siemens AG v. the Argentine Republic*,<sup>299</sup> and *AWG v. The Argentine Republic*,<sup>300</sup> eloquently analyzed this proposition.

469. In *Siemens*, Claimant sought to import the procedural right of directly filing an arbitral claim without the condition precedent of applying for judicial recourse in local courts pursuant to the BIT between Argentina and Chile.

470. The Tribunal dismissed the jurisdictional objection that the MFN clause in the underlying BIT, which lacked any explicit qualifications, did not provide for the importation of procedural rights.<sup>301</sup> Respondent further bolstered this assertion by arguing that Claimant's

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sustancial y el del derecho procesal. No existe contradicción entre los artículos 2539 del Código Civil y 90 del Código de Procedimiento Civil. En realidad las dos normas se complementan armónicamente, pues la segunda se concreta a regular lo concerniente a la interrupción de la prescripción una vez presentada la demanda es decir, dentro del proceso.

<sup>299</sup> *Siemens AG v. the Argentine Republic*, ICSID Case No. ARB/02/8, CL-0074.

<sup>300</sup> *AWG Group Ltd. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (Decision on Jurisdiction) (August 3, 2006), CL-0007.

<sup>301</sup> *Siemens*, ¶¶ 32-35.

reliance on *Maffezini* was inapposite because the MFN clause in that case was uniquely broad where the treaty at issue merely mentioned the word “treatment,” without more.

471. The Tribunal rejected Respondent’s jurisdictional objection on this ground and in so doing observed:

The Respondent has argued that, in *Ambatielos*, administration of justice refers to substantive procedural rights like just and equitable treatment and not purely jurisdictional matters. *The Tribunal does not find any basis in the reasoning of the Commission to justify such distinction.* On the other hand, the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection has as a distinctive feature special dispute mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.<sup>302</sup>

(emphasis supplied).

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<sup>302</sup> *Id.* ¶ 102.



472. The Tribunal further noted that its findings on this issue comport with *Maffezini* notwithstanding the broad “all matters subject to this agreement” MFN clause in the *Maffezini* Spain-Argentina BIT, and the “treatment” only scope contained in the Federal German Republic-Argentina BIT.<sup>303</sup> In this regard it held “that the formulation is narrower but, as concluded above, it “considers that the term ‘treatment’ and the phrase ‘activities related to the investments’ are sufficiently wide to include settlement of disputes.”<sup>304</sup>

473. Likewise, in *AWG v. The Argentine Republic*, the Tribunal found that Claimant, relying on Art. IV of the Argentina-Spain BIT and a second Claimant placing reliance on Art. II of the Argentina-UK BIT, were able to invoke more favorable procedural rights that Argentina afforded to France in the Argentina-France BIT, and allowed them to perfect a claim without first meeting the condition precedent of having sought recourse to local courts of Argentina.<sup>305</sup>

474. In explaining its holding the Tribunal reasoned that it found “no rule and no reason for interpreting the Most-Favored-Nation treatment

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<sup>303</sup> *Id.* ¶ 103.

<sup>304</sup> *Id.*

<sup>305</sup> *AWG Group Ltd.*, ¶ 68.

clause any differently from any other clause in the two BITS.”<sup>306</sup> It was further explained that:

[t]he language of the two treaties is clear. Applying the normal interpretational methodology to Article IV of the Argentina-Spain BIT, the Tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term ‘all matters’ and that therefore [Claimant] may take advantage of the more favorable treatment provided to investors in the Argentina-France BIT with respect to dispute settlement. Similarly, in the case of the Argentina-UK BIT, rights with respect to dispute settlement ‘regard’ the management, maintenance, use, enjoyment and disposal of an investment as stated in Article 3 of the treaty; consequently, [different Claimant] may also take advantage of the more favorable treatment that the Argentina-France BIT accords to French investors.<sup>307</sup>

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<sup>306</sup> *Id.* ¶ 61.

<sup>307</sup> *Id.*

475. More specifically on the narrow issue of drawing differences without distinctions concerning substantive and procedural rights within the ambit of an unqualified MFN clause, the Tribunal observed:

After an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon. In this context, the Respondent further argues that this Tribunal should apply the principle of *ejusdem generis* in interpreting the BITs so as to exclude dispute settlement matters from the scope of the most-favored-nation clause, because the category ‘dispute settlement’ is not of the same *genus* as the matters addressed in the clause.

The Tribunal finds no basis for applying the *ejusdem generis* principle to arrive at that result.<sup>308</sup>

476. The absence of any restrictive or qualifying language in the TPA, the negotiation dynamic and context to which Mr. Olin Wethington testifies, and the Parties' clear treaty practice, compellingly invites the interpreter to engage in a reasonable and functional purpose-driven interpretation of Art. 12.3 (MFN). Such construction should compel the finding that Art. 12.3 (MFN) is not restricted so as to exclude the importation of procedural or other rights that do not give rise to a rewriting of the applicable provisions.

477. Within the context of the TPA procedural rights, much as is the case with its substantive counterparts, share the common function of protecting cross-border investments in the Financial Services sector. Respondent clouds this orthodox and rather standard analysis, which simply focuses on whether the treaty structure and "treatment" qualification of an MFN clause allow for the importation of procedural rights, by framing the analysis as one concerning the importation of substantive rights that under no analysis could give rise to consent.

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<sup>308</sup> *Id.* ¶ 59.

478. Respondent ignores the significant body of Tribunal findings that MFN clauses reach both procedural and substantive rights absent express limitations in the treaty containing the MFN clause or in the MFN clause itself. No such limitation is here present.

479. The *Impregilo S.p.A. v. Argentine Republic*<sup>309</sup> Tribunal took considerable pains to analyze the term “treatment” as a self-contained standard separate and distinct from the “all matters” scope, and in so doing rejected Respondent’s restrictive application of the *ejusdem generis* principle:

The Arbitral Tribunal is of the opinion that the term ‘treatment’ is in itself wide enough to be applicable also to procedural matters such as dispute settlement. Moreover, the wording ‘all other matters regulated by this Agreement’ is certainly *also* wide enough to cover the dispute settlement rules. The argument that the *ejusdem generis* principle would limit its application to matters similar to ‘investments’ and ‘income and activities related to such investments’

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<sup>309</sup> *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17 (Award) (June 2011), CL-0037.

is not convincing, since the wording does not allow ‘all other matters’ to be read as ‘all similar matters’ or ‘all other matters of the same kind.’ Nor is the argument that an embracing concept like ‘all other matters’ would make the previously mentioned terms ‘investments’ and ‘income and activities related to such investments’ superfluous, since it is indeed not unusual in legal drafting to indicate typical examples even in provisions which are intended to be of general application.<sup>310</sup>

480. Along this same line of reasoning, now limited only to “treatment” scope MFN clauses, the Tribunal noted that “[e]ven in some -- but not all -- cases where the MFN clauses were less comprehensive [than the ‘all matters’ MFN scope clauses] and only provided for MFN *treatment* of investors and investments, the Tribunal found this to be sufficient to cover dispute settlement. Cases on point are *Siemens*, *National Grid*, and *RosInvest*.”<sup>311</sup>

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<sup>310</sup> *Id.* ¶ 99. (emphasis supplied).

<sup>311</sup> *Id.* ¶ 105. (citations omitted). (emphasis supplied). Claimant is aware the *RosInvest* award has been annulled on other grounds.

481. If the Tribunal disclosed with respect to the “all matters” MFN clauses, the Tribunal identified *Salini*,<sup>312</sup> *Plama*,<sup>313</sup> *Telenor*,<sup>314</sup> and *Wintershall*,<sup>315</sup> as cases addressing the “treatment” MFN scope holding that the importation of procedural rights were proscribed.<sup>316</sup> Hence, it cautioned that “[i]t appears from these awards that *some* tribunals have had rather strong *reservations* about the general development of the case law in this area. It is therefore clear that these cases remain controversial and that the predominating jurisprudence which has developed is in no way universally accepted.”<sup>317</sup>

482. The Tribunal did, nonetheless, identify the majority view, albeit with the qualification that it is hardly “universally accepted.”

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<sup>312</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 13 (Award) (January 31, 2006), CL-067.

<sup>313</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award) (August 27, 2008), CL-0054.

<sup>314</sup> *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award) (September 13, 2006), CL-0081.

<sup>315</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award) (December 8, 2008), CL-0088.

<sup>316</sup> *Impregilo S.p.A.*, ¶ 107, CL-0036.

<sup>317</sup> *Id.* (emphasis supplied).

483. Third, the Tribunal candidly and respectfully expressed concern that questions so consequential as presumably the right of an investor to receive the procedural protection that a Contracting State accords to a third State by dint of an investment protection treaty, “*would in each case be dependent on the personal opinions of individual arbitrators.*”<sup>318</sup> Indeed, it characterizes this possible state of affairs as “*unfortunate.*”<sup>319</sup>

484. The majority of the *Impregilio* Arbitral Tribunal’s descriptive constructive comments were accompanied by the commonsensical exhortation to avoid aprioristic opinion-based adjudications by “mak[ing] the determination on the basis of case law whenever a clear case law can be discerned,” and in the context of each particular case.<sup>320</sup>

485. Respondent’s Answer parts way with an analysis based upon the particulars concerning (i) the actual language of Art. 12.3 (MFN), (ii) the context in which Art. 12.3 (MFN) is placed within the treaty, i.e., in a Financial Services Chapter, (iii) the negotiating history and testimony of the lead negotiator of the treaty chapter that served as the paradigm and template for Chapter 12 (Financial Services) of the TPA, and (iv) the very fact that the

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<sup>318</sup> *Id.* ¶ 108. (emphasis supplied).

<sup>319</sup> *Id.* (emphasis supplied).

<sup>320</sup> *Id.*



structure, workings, and objectives of a TPA differs from that of a BIT.

486. While certainly the “jurisprudence” addressing the extent to which MFN clauses may be exercised to import procedural rights from other agreements or treaties is in an intriguing and inviting state of flux, the operative presumptions and methodologies to analyze such an issue are not. This fact is important. Respondent’s Answer, with all due respect, is but a cut-and-paste of what it opines to be analytically useful language. Indeed, Respondent avoids consideration, let alone sustained analysis, of these four referenced factors. As previously noted, but for one article, Respondent simply carves out of its memorial the entirety of Chapter 12.

**a. The Scope and Plain Meaning of Article 12.3 (MFN) and Its Context in a Financial Services Chapter**

487. Leaving to one side treaty practice unequivocally establishing that Colombia and the United States in other treaties and agreements, and certainly with respect to the TPA, plainly state in writing restrictions and qualifications to obligations and rights, as well as the expert and fact testimony of Mr. Wethington and Prof. Mistelis, it is plain that Art. 12.3 (MFN) is a broad most-

avored nation treatment provision. A plain meaning review of the clause places it as a “treatment” scope MFN clause.

488. A plain textual consideration reveals that the term “treatment” in Art. 12.3 is not qualified or at all restricted. In fact, it is very much akin to an “all matters” standard or clause. The reason is simple. Instead of stating “all matters” contained in this Chapter, Art. 12.3 goes on to list broad but very particular categories of subject matters that comprise the entirety of Chapter 12 (Financial Services).

489. Following the word “treatment” in Art. 12.3.1 and the articulation of the “no less favorable than it accords,” the provision lists as its subject matter (i) “investors,” (ii) “financial institutions,” (iii) “investments of investors in financial institutions,” and (iv) “cross-border financial service supplier,” of course, “of any other Party or of a non-Party, in like circumstances.”

490. The plain meaning and ordinary construction of this language is expansive and not restricted. Certainly, it is materially distinguishable from the MFN clause at issue in any of the cases on which Respondent seems to rely.

491. Respondent ignores the scope of the term “treatment” as that term is used in Art. 12.3.1

(MFN). Colombia similarly sidesteps the context in which Art. 12.3 is placed within the TPA.

492. Chapter 12 is designed to promote and to protect cross-border investments in the Financial Services sector. Hence, it is concerned with a very particular type of investment that, unlike its Chapter 10 (Investment) counterpart, is uniquely vulnerable to a State's exercise of regulatory and legislative sovereignty. In this regard, Chapter 12 certainly seeks to safeguard the Parties' exercise of prudential measures regulatory sovereignty.<sup>321</sup>

493. An equal and corresponding imperative, however, is to maximize the treatment standards of protection that both would (i) promote and entice cross-border investment in the Financial Services sector, *and* (ii) protect such investors and investments. Both of these objectives are furthered and made possible in the context of the Financial Services Chapter by having a fulsome Art. 12.3 (MFN) treatment provision. Consequently, it necessarily follows that the context (in a Financial Services Chapter) and purpose of Art. 12.3 (MFN) supports an expansive and comprehensive interpretation of the term "treatment" as it is used in that Article.

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<sup>321</sup> Art. 12.10 (Exceptions) is a clear and immediate example.

494. The vast majority of *all* cases addressing a standard “treatment” scope of an MFN provision in a BIT would manifestly provide for the exercise of such a clause for purposes of importing more favorable procedural rights, let alone the authority discussing “all matters” MFN scope provisions.<sup>322</sup>

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<sup>322</sup> Claimant, in furtherance of academic integrity, in the initial memorial discussed “the ‘all matters’ and the ‘treatment’ standards (¶¶ 222-243), as well as authority **proscribing** application of “treatment” MFN clause scope as to procedural rights. (¶¶ 244-253). In these analyses Claimant reviewed, as a very initial matter (i) *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (Award) (January 31, 2006) (¶¶ 244-248), (ii) *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award) (September 13, 2006), (iii) *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Award) (August 27, 2008), and (iv) *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award) (December 8, 2008), and at the very outset asserted the reasons why Claimant found this authority to be inapposite to the case before this Tribunal.

Even though Respondent cites to this authority, there is absolutely no “answer” or “reply” to the analyses that Claimant provided in the initial Memorial. Having already raised these premises, Claimant has reasserted them only in a very limited manner as warranted for the sake of greater context. Thus, Claimant respectfully invites the Tribunal to revisit the referenced paragraphs when considering Respondent’s scant articulation of the *ratio decidendi* and purported holding concerning this specific authority.

495. There is no reported case or authority analyzing the scope of an MFN clause in the context of a Financial Services Chapter of a trade protection agreement, let alone cases broadly qualifying the term “treatment” as it appears in Art. 12.3.1. This analysis, as suggested, is one of first impression.

496. In conclusion, Respondent invites this Tribunal to avoid consideration of the term “treatment” generally, and certainly in the context of Art. 12.3.1, as well as the contextual placement of this term as resting in a Financial Services Chapter in a trade agreement the workings and objectives of which are much broader than that of most “standard” BITs.

497. In a similar vein, Respondent invites the Tribunal to ignore altogether that even within the parameters of Respondent’s interpretive theory concerning Art. 12.1.2(b), consent is not being imported because, at minimum beyond any rational quibble, there is consent for financial investors to arbitrate Art. 10.7 (Expropriation and Compensation) as incorporated into Art. 12.1.2(b). Thus, accepting Respondent’s analysis, only *arguendo*, at issue here is the scope of consent but not whether there is consent at all.

498. Respondent offers no argument challenging the importation of a five-year

limitations period from the Colombia-Switzerland BIT. With respect to this proposition it only asserts that the importation of Section B must contain the Footnote 2 restrictive measure upon penalty of not rendering the footnote *effet utile*. As has already been shown, the proposition is not sustainable on multiple grounds. Not the least of these premises is that Art. 10.2.1 provides that “[i]n the event of any inconsistency between this Chapter and any other Chapter, the other Chapter shall prevail to the extent of inconsistency.”

499. Struggle as Respondent may, the exercise of Art. 12.3 (MFN) to import more favorable procedural and substantive terms from the Colombia-Switzerland BIT is hardly capable of being characterized as the substitution of non-existing consent by fiat of an MFN provision.

**IV. RESPONDENT’S TECHNICAL ARGUMENTS CONCERNING (I) WAIVER, (II) CONSULTATION, AND (III) NOTICE OF INTENT ARE MISPLACED**

**1. No Waiver Requirement Applies to the Present Case**

500. Respondent argues that Claimant has failed to comply with a “requirement of waiver” under Article 10.18.2(b) of the TPA, pursuant to which the Claimant is to file a notice of waiver to initiate or continue any dispute settlement

procedures with respect to measures alleged to constitute a breach of Article 10.16.<sup>323</sup>

501. That provision does not apply to this arbitration.

502. Claimant repeatedly has represented that this claim has been brought under Articles 11 and 12 of the dispute resolution provisions of the Colombia-Switzerland BIT. The procedural rights contained in Chapter 10 of the TPA have not been invoked. Claimant and her investment in the Colombian Financial Services sector are governed by the specific provisions of the TPA's Chapter 12 (Financial Services). This Chapter must be regarded as *lex specialis vis a vis* Chapter 10 of the TPA.

503. Colombia has agreed to arbitrate foreign investment disputes falling within the Chapter 12 scope of application. As a result, in principle, the offer to arbitrate is in place and is effective.

504. Colombia has offered Swiss investors more favorable dispute resolution protection. Indeed, the provisions available under the Colombia-Switzerland BIT, *inter alia*, do not include a waiver requirement. Claimant relies on

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<sup>323</sup> See Answer Memorial ¶¶ 284-291.

the dispute resolution procedure of the referenced BIT. Therefore, no waiver is required.

505. Claimant is entitled to do so by operation of the unqualified Art. 12.3 (MFN) clause.

506. Respondent has accepted that the dispute resolution provisions under the Colombia-Switzerland BIT are applicable to the present case. Indeed, in another section of its Answer, Respondent has raised a fork in the road defense pursuant to a provision of the Colombia-Switzerland BIT.<sup>324</sup>

507. But, assuming that the waiver provision applied to the present case, which it does not for the stated reason, the defense that Respondent raised fails because the conceptual requirements necessary for the waiver provision to become effective are not present in this case.

508. The provision on which Respondent relies is Article 10.18.2(b) of the TPA. For convenience that provision is reproduced below:

2. No claim may be submitted to arbitration under this Section unless:
  - (a) the claimant consents in writing to arbitration in accordance with

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<sup>324</sup> Part III.C.1.c.



the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

509. As is well known, the operational objective of waiver clauses is to avoid that the *same*, overlapping claims for the breach of the *same* provisions and protections under the US-Colombia TPA is brought before domestic means of dispute resolution, and before an international investment treaty arbitral tribunal.

510. The ultimate objective of such clauses is to foreclose the risk of double recovery. It has no other purpose.

511. Considering the *ratio operandi* of this provision, it is evident and readily demonstrable that no waiver requirement ever accrued in the present dispute for the following reasons, all of which are being presented for argument's sake. The waiver requirement does not, and cannot, apply because it forms no part of the Swiss-Colombia BIT.

512. The waiver provision does not apply for at least four simple reasons. First, Claimant is exercising Art. 12.3 (MFN) to extend to Articles 11 and 12 of the Colombia-Switzerland BIT. The treaty has no waiver jurisdictional predicate requirement. This should be the end of any further consideration. No additional analysis is warranted.

513. Second, even were Claimant exercising Chapter 10 ISDS recourse, the "waiver" argument fails. Here as well the reason is simple. The policy, purpose, and workings of the "waiver" is to award double recovery for damages alleged arising from the same or related facts. This proposition is beyond quibble.

514. The proceeding before the Commission on which Respondent's argument rests is not one that seeks compensatory damages. In fact, even if

the Carrizosa family in that proceeding had petitioned an award of compensatory damages, it could not have been so compensated.

515. As a matter of law, neither the Commission nor the Inter-American Court of Human Rights has jurisdiction to award anything other than a non-pecuniary recommendation. Here as well the inquiry as to waiver also would end.

516. Third, the waiver provision expressly concerns the filing of a (i) domestic proceeding, (ii) in the courts of the host-State. Neither condition is here present as a matter of undisputed facts. Respondent's waiver challenge also fails on yet this additional ground.

517. Fourth and finally, for the sake of academic completeness, understandably Tribunals that have addressed this concern have found that the requirement can be met at *any time* prior to the merits phase. Thus, if this Tribunal were to find that (i) there was a parallel proceeding, (ii) before a national tribunal, (iii) of the host-State, (iv) which case petitioned for *compensatory damages*, and (v) such tribunal had jurisdiction to award that compensation, then, of course, Claimant stands ready to file a waiver as this cause is in only the jurisdictional phase of the proceedings. But none of these conditions are present.

518. The provision under Article 10.18.2(b) of the TPA contains specific reference to courts and tribunals under the law of the host-State or other settlement procedures outside of those courts. That provision limits the scope of application of the waiver requirement to actions under domestic law and before domestic fora.

519. The case that Respondent relies on is different because it concerns a proceeding brought before an international tribunal for the breach of an international human rights treaty. Even the cases that Respondent cites in support its waiver defense expressly and repeatedly state that the waiver provision focuses on the existence of *domestic proceedings* brought by the investor for the same breach of treaty and pursuing the *same* relief.

520. The provision under Article 10.18.2(b) of the TPA requires the issuance of a waiver with respect to claims that are brought, or may be brought, with respect to measures that are alleged to constitute a breach referred to in Article 10.16.1 of the TPA.

521. Article 10.16.1 defines such a breach as an “investment dispute” resulting from a breach by the Respondent of an obligation under Section A of Chapter 10 of the TPA.

522. No dispute for breach of the protections guaranteed under the TPA ever has been brought by Claimant against Colombia before any other forum. Of course, Respondent has not, because it cannot, proffer such a showing.

523. This point deserves further analysis. Throughout this reply, Claimant has stressed that the enforcement of treaty provisions must follow Article 31 of the VCLT. The tried and true stricture of this provision is once more necessary.

524. Colombia and the US expressly have agreed that a waiver would be required in the presence of a claim for breach of the investment protections under the same TPA. Article 10.16.1. This much is clear.

525. In order for a waiver to become a condition precedent pursuant to the provisions of Art. 10.18.2 it must be established whether Claimant has brought a claim before a domestic forum in Colombia for the breach of the investment protections under Chapter 10 of the TPA. No such claims exist, as Respondent (a State) is well aware.

526. Because the waiver provision has the potential of limiting access to justice, it is respectfully submitted that the Tribunal analyze the waiver requirement and Respondent's waiver defense with particular care.

527. Respondent is taking issue with a complaint filed by Claimant's family before the Inter American Commission for Human Rights ("IACHR" or "the Commission").

528. Proceedings before non-judicial institutions such as the IACHR are of political nature. Nonetheless, Respondent suggests that the complaint that Claimant filed before the IACHR has the characteristics necessary to fall within the TPA's waiver provision.

529. Providing Respondent with the benefit of any doubt concerning the good faith in which this defense is brought, it is likely that Respondent is raising this defense on an "incorrect" reading of the Inter-American Human Rights system (the "Organization"). Some clarification in that respect is necessary.

530. The Organization is a regional initiative for the promotion and protection of human rights. It is composed of a number of organs, *inter alia*, including: (a) the Commission and (b) the Inter-American Court of Human Rights ("Court" or "Inter-American Court").

531. The Commission might process and analyze petitions with a view to determining whether a contracting State might have committed a violation of human rights. If that is the case the Commission might issue a "Recommendation" to

the relevant State asking the latter to address the issue (Chapter VII). In selected circumstances the Commission may apply to the Inter-American Court for enforcement of rights.

532. The Commission *is not* a judicial organ. The only judicial organ within the Inter-American Human Rights Organization is the Inter-American Court. Only State Parties to the American Convention on Human Rights and the Commission have access to the judicial functions of the Court pursuant to Article 61 of the American Convention on Human Rights.

533. This fact also is confirmed by Colombia's failure to interact and abide by the request for comments sent to Colombia by the IACHR.

534. On April 25, 2019, the IACHR sent a letter asking Colombia to provide comments, within three months, concerning the Carrizosa Family's petition. A copy of the letter is annexed as C-0034.

535. Colombia failed to provide such comments – a lack of response that would not have occurred before a judicial tribunal.

536. Finally, even if Claimant wished to start judicial proceedings before the Court, i.e. the only organ of a judicial nature within the

Organization, she could not do so because she does not have *jus standi* before that institution.

537. Hence, even assuming the inapplicability of Articles 11 and 12 of the Colombia-Switzerland BIT, Respondent's waiver argument fails.

538. Respondent's Answer, as concerns the waiver requirement, contains a small schematic by which Respondent attempts to demonstrate more than just aesthetic similarities between this arbitral proceeding and the case before the Commission.

539. As discussed above, the Commission's functions do not have a judicial nature. Therefore, by definition, any petition brought or pending before the Commission cannot be duplicative of the action before this Tribunal.

540. Respondent draws a parallel between the present proceeding and the petition before the Commission by focusing on a number of measures. That strategy is flawed and bereft of credibility. The measure at issue in this arbitration is the June 2014 denial of reconsideration bringing finality to that matter. Any comparison between this arbitration and the petition before the Commission must be based on an identity test between causes of action pleaded and damages sought.



541. Even a preliminary analysis of the *causa petendi* and *petitum* in the two cases demonstrates the radical differences between the two actions that would foreclose a need for a waiver.

542. The present arbitration is being brought for the breach of a number of obligations under an international agreement for trade and the protection of foreign investors and foreign investments in the Colombian Financial Services sector.

543. The proceeding before the IACHR was filed based on the alleged breach of the American Convention on Human Rights. The subject matter and the causes of action could not be more distinct.

544. In the present proceeding Claimant is seeking an award ordering Colombia to compensate the damages suffered as a result of Colombia's breach of the TPA. A preliminary analysis of the damages that the Claimant suffered has been provided to the Tribunal.

545. In the IACHR proceeding, by operation of law, as noted, the Commission cannot issue a judgement for compensatory (pecuniary) damages that would be final and immediately enforceable pursuant to the provisions of either the New York Convention 1958, or the ICSID Convention 1965.

546. Set forth below is a more accurate graphic that Respondent should have inserted in its Answer.

<b>Causa Petendi in this Arbitration</b>	<b>Causa Petendi before the IACHR</b>
Breach of investment protection standards under the TPA	Breach of Human Rights provisions under the ACHR
<b>Petitum in this Arbitration</b>	<b>Petitum before the IACHR</b>
Final Award of Damages	Recommendation

**a. The Authority on Which Colombia Relies is Inapplicable**

547. The case law that Respondent cites is, at best, irrelevant and often even detrimental to Respondent’s own interests. The Tribunal is urged to consider it with care.

548. Respondent develops its waiver defense by relying on a number of investment arbitration cases. Each and every case cited contains premises explaining the reasons why the waiver defense must fail. These premises are each in turn analyzed.

549. Respondent relies upon *Renco Group v. Perú*.<sup>325</sup>

550. In that case the Tribunal clarified that the provisions under the US-Perú TPA, which are practically identical to the provisions under Article 10.18.2 of the TPA, are:

- (i) aimed at domestic proceedings under domestic law,
- (ii) directed at actions for the breach of the same legal provisions, and
- (iv) intended to prevent double recovery and breach of *res judicata*.

551. The Tribunal expressed those concepts as follows:

84. The Tribunal's interpretation of Article 10.18(2)(b) is consistent with the object and purpose of the waiver provision. *Renco, Perú and the United States all agree* that the object and purpose of Article 10.18(2)(b) is to protect a respondent State from having to litigate multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent

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<sup>325</sup> *Renco Group v. Peru*, UNCT/13/1, (Partial Award on Jurisdiction) July 15, 2016).

determinations of fact and law by different tribunals.

[...]

88. [...] There is also a risk that Renco may recover twice for the same damage and/or that the domestic court or tribunal may reach conflicting findings of fact or law. In the Tribunal's opinion, Article 10.18(2)(b) is designed to avoid these risks from eventuating.

(emphasis supplied).

552. Respondent also relies on *Waste Management v. Mexico*. However, that case is concerned with the scope and effect of a waiver that had been issued. In that case, more precisely, the Tribunal addressed the issue whether a qualified waiver could meet the requirements of form and substance that the NAFTA requires.

553. The only relevant language in that decision is *dicta* clarifying that waivers must have the same "legal basis" (not the same factual grounds) and that there must be an "*imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what*

*NAFTA Article 1121 seeks to avoid.*<sup>326</sup> (emphasis supplied)

554. Therefore, the legal basis must be the *same* and there must be an *imminent risk of double recovery*. Those elements are not present here.

555. Similarly, in *Thunderbird v Mexico* the Tribunal stressed both the purpose and requirement for a waiver provision to become effective:

118. In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that

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<sup>326</sup> Paragraph 27 at pages 235 and 236.

Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.

556. Interestingly, the Tribunal in *Thunderbird* also observed:

117. Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. *The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA.* The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner. [citation omitted]

(emphasis supplied).

557. This language from *Thunderbird* is important. In the unlikely event that this Tribunal found that a waiver is necessary, Claimant should not be precluded from providing one.

558. This is particularly the case at this bifurcated stage of the proceedings where the Tribunal is expected to rule on jurisdiction only and, therefore, there is no risk that a finding of the Tribunal may result in an award of damages and, potentially, a risk double-recovery.

559. A waiver, if necessary and notwithstanding Claimant's reliance on procedural rights from the Colombia-Switzerland BIT that does not so require, could be required at the outset of the merits phase of the proceeding to file a waiver as a predicate to that hearing.

560. Respondent places much emphasis on the award rendered in *Commerce Group v. El Salvador* where the Tribunal, *inter alia*, addressed the waiver provision under Article 10.18 of CAFTA, which is similar to the waiver provision under Chapter 10 of the TPA. The same applies to *Railroad Development v. Guatemala*.

561. Those cases address the scope of waiver declarations and take into account the potential interaction of the international investment arbitration proceedings with proceedings brought before *domestic fora*. As a

result those case not only are inapposite but, if anything, they support Claimant's position concerning *ratione forae*.

562. This case arises from a judicial expropriation that in turn gave rise to an institutional crisis from which Colombia's judiciary is yet to recover. It is an unfortunate event having ramifications far beyond the parameters of this proceeding. Colombia is well advised in seeking to avoid at all costs an embarrassing merits hearing that would underscore the usurpation by the Constitutional Court (a court of last resort) of the jurisdiction of its peer tribunal of equal hierarchy and ranking, the Council of State (also a tribunal of last resort).

563. Recourse, however, to baseless technical grounds can only bring to mind the abuse of process that precipitated the filing of this arbitral proceeding in the first instance.

## **2. Consultation and Negotiation (Article 10.15) and Formal Notice of Intent (Article 10.16.2)**

### **a. General Remarks Applicable to Both Defenses**

564. Respondent alleges Claimant failed to comply with (i) the consultation and negotiation



provision in Article 10.15<sup>327</sup> of the TPA and (ii) the notice of intent provision contained in Article 10.16 of the TPA.<sup>328</sup>

565. As a predicate to analyzing the technical merits of the defenses it is necessary to provide the Arbitral Tribunal with a number of clarifications that are applicable to both defenses.

**b. The Dispute Resolution Provisions  
Under Chapter 10 of the TPA Do  
Not Apply to This Arbitration**

566. As with waiver, Claimant has repeatedly asserted that Chapter 10 does not apply to this cause. Claimant is traveling under Articles 11 and 12 of the Colombia-Switzerland BIT. Respondent selectively vacillates between the Colombia-Switzerland BIT and the TPA according to the expediency of the arguments that it contemplates asserting. Claimant is exercising rights under Art. 12.3 (MFN).

567. Claimant and her investments in the Colombian Financial Services sector are governed by the specific provisions under Chapter 12 of the TPA, which is devoted to Financial Services and must be regarded as *lex specialis vis a vis* Chapter 10 of the TPA.

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<sup>327</sup> See Respondent Counter-Memorial ¶¶ 284-286.

<sup>328</sup> See Respondent Counter-Memorial ¶¶ 287-291.

568. Colombia has agreed to arbitrate foreign investment disputes falling within the scope of application of Chapter 12 of the TPA. As a result, in principle, the offer to arbitrate is in place and is effective.

569. Colombia has offered Swiss investors more favorable dispute resolution protection. As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT.

570. Whether Claimant was expected to initiate consultations and negotiations or whether she was expected to provide Colombia with a notice of intent must be ascertained with reference to the provisions under Article 11 of the Colombia-Switzerland BIT.

**c. The Colombia-Switzerland Bit Does Not Impose Any Requirements Affecting Jurisdiction**

571. Article 11 in part reads:

Article 11 Settlement of disputes between a Party and an investor of the other Party

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an

obligation of this Agreement, thus causing loss or damage to him or his investment, he **may** request consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of written request for consultations **may** be referred to the courts or administrative tribunals of the Party concerned or to international arbitration [...]

(emphasis supplied).

572. The suggestion is in the permissive. Clearly no obligation is imposed upon the investor to instigate consultations. The Parties consented to a permissive standard. Also, there is no indication whatsoever about the need to provide the prospective Respondent with a notice of intent. Here again, Respondent “cherry-picks.”<sup>329</sup>

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<sup>329</sup> The Colombia-Switzerland BIT is a good example of clear treaty drafting, particularly with respect of the correct use of modal verbs. Article 11 of that BIT is no exception.

Where the contracting Parties wished to establish an option or a choice for the benefit of the relevant recipient of the provision they, correctly, used the modal verb “may.”

Where the contracting Parties wished to establish a firm and binding obligation, they used the modal verb “shall.”

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Examples are in place. Article 11(1) states that if an investor considers that a measure applied by the host State is inconsistent with an obligation under the BIT:

[...] he **may** request consultations with a view to resolving the matter amicably.

(emphasis supplied).

Comparing that provision with other provisions of a different nature and effect under the same Article 11. One provision is directed at the foreign investor and two provisions are directed at the contracting Parties. Article 11(4) states:

Once the investor has referred the dispute to either a national tribunal or any of international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure **shall be final**.

(emphasis supplied).

As regards the obligation of the contracting States, the following two provisions are enlightening:

Article 11(6)

The Party which is party to the dispute **shall at no time whatsoever** during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

Article 11(7)

**Neither Party shall pursue** through diplomatic channels a dispute submitted to

**d. The Contracting Parties Expressly  
Agreed That Consent Is  
Unconditional**

573. Appropriate, by way of example and pleading, is Article 11(3) of the Colombia-Switzerland BIT according to which:

Each Party hereby gives *its unconditional and irrevocable consent* to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.

(emphasis supplied).

574. This provision is important for a number of reasons.

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international arbitration unless the other Party does not abide by and comply with the arbitral award.

(emphasis supplied).

575. First, it evidences that the BIT employs very accurate and unmistakable wording when it comes to creating a binding obligation.

576. Second, and perhaps most importantly, **the contracting Parties have expressly agreed that their consent to arbitration is unconditional.**

577. Therefore, no provision under Article 11 can be seen or should be understood as creating a condition precedent for a dispute to be validly submitted.

578. In other words, Respondent's defense *ratione voluntatis* in this respect is just meritless and consonant with a pleading practice that raises every existing cognizable defense, irrespective of merit or applicability. This approach to an adversarial process simply crosses the parameters of good faith and basic reasonableness.

**e. Colombia Is Raising These Two Defenses in Bad Faith to Abuse the Process**

579. Assuming, for the sake of argument, that the two provisions under the TPA on which Respondent relies were to apply, Respondent's strategy should fail because of its *abusive* nature.

580. The two defenses that Respondent are nothing more than just another brazen attempt to negate Claimant's access to justice through recourse to spurious legal arguments. Neither the

argument nor the attitude should be countenanced. Respondent has resolved that Claimant should not have access to justice and is going to any extent to pursue its persecutory strategy.

581. It is important to clarify the scope and objective of Articles 10.15 and 10.16.2 of the TPA.

582. Neither article is meant to provide the Respondent State with any particular type of protection nor are they meant to impose any condition precedent to be fulfilled before arbitration proceedings can be commenced. *The only objective of these two provisions is to facilitate settlement negotiations before the dispute is submitted to arbitration.*

583. That objective is significant in cases where the existence of a dispute may not be known to the host-State. In fact, that is the purpose of these provisions. The typical example of such situation is a dispute brought as a result of a bona fide change to the legislative or regulatory acts affecting large numbers of foreign investments or entire industrial sectors.

584. Second, the present dispute is the result of a deliberate strategy implemented by the highest echelons of the Colombian Government against specific foreign (non-Colombian) individuals. Colombia knows only too well that it mistreated and discriminated against the Carrizosa Family. Colombia is aware that the Carrizosa

Family is pursuing *all* available and compatible avenues to defend their rights and vindicate a wrong. Respondent was aware of this dispute well before the present arbitration was commenced.

585. This dispute has been going on for a number of years. Respondent has acknowledged as much. Claimant has tried on multiple occasions to create the conditions for settlement. Respondent would have none of it.

586. At least two instances are emblematic and make plain that it is a violation of basic ethics to have raised these defenses.

**f. The Debate Before the Inter  
American Commission on Human  
Rights**

587. Prior to commencing this arbitration Claimant has pursued political channels of reconciliation in part by filing a petition with the Inter American Commission on Human Rights (IACHR).

588. As explained in the part of this Reply addressing Respondent's Fork-in-the-Road defense, the initiative before the IACHR does not amount to a binding means of dispute resolution comparable or in conflict with the present arbitration. Indeed, the most successful outcome for the petitioners before the IACHR would be a recommendation that



the IACHR may direct to Colombia to address the human rights violations there at issue.

589. Yet, Respondent never attempted to embark on any consultations or negotiations with Claimant. The reason for this failure is simple and disheartening. Respondent does not wish to consult or to negotiate with Claimant.

590. The paradox associated with Respondent's defense is that Article 40 of the Rules of Procedure of the Inter American Commission on Human Rights contains a procedure for the amicable settlement of disputes. Had Colombia been interested in consultations and negotiations, it would have instigated that procedure.<sup>330</sup>

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<sup>330</sup> Article 40 states as follows:

Article 40. Friendly Settlement

1. On its own initiative or at the request of any of the parties, the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments.
2. The friendly settlement procedure shall be initiated and continue on the basis of the consent of the parties.

591. In addition, by letter dated April 25, 2019 the Executive Secretary of the Inter American Commission of Human Rights informed the Carrizosa Family that Colombia had been provided with three months' time to provide its comments on the Carrizosa Family's petitions. In that same letter the Executive Secretary reminded the recipient about the provisions concerning settlement set forth in Article 40. (See Exhibit C-0034).

592. Respondent, of course failed to comply with the request. The cannot now come before this Tribunal with dirty hands, citing to the wrong provision of the wrong treaty, and petition for dismissal of a case in which the Executive branch of

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3. When it deems it necessary, the Commission may entrust to one or more of its members the task of facilitating negotiations between the parties.

4. The Commission may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights.

5. If a friendly settlement is reached, [...]

6. If no friendly settlement is reached, the Commission shall continue to process the petition or case.

the government of the Republic of Colombia forced the Constitutional Court in effect to steal the Council of State's judgment exceeding \$200,000,000 against Colombia and in favor of Claimant, and assert that no effect was undertaken to explore amicable settlement of the differences between the parties.

593. Colombia's request is frivolous and disrespectful to this proceeding and to its own standing as a sovereign.

594. Just to summarize the facts and their legal significance with respect of Respondent's intended abuse of process:

**g. The Letter Accompanying the Request for Arbitration**

595. In January 2018 counsel for Claimant served Respondent with the Request for Arbitration under the UNCITRAL Rules, by which a parallel proceeding was commenced on behalf of other members of the Carrizosa family.

596. The Request for Arbitration was accompanied by a letter dated January 24, 2018.<sup>331</sup> In that correspondence Respondent explicitly was invited to explore settlement discussions. The letter in pertinent part reads:

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<sup>331</sup> See Claimant's Exhibit C-0038.

Should you care to discuss any possible non-arbitral settlement of this proceeding, please feel free to contact me at your pleasure. We opine that going forward settlement opportunities, at least from claimants' perspective, shall indeed dwindle.<sup>332</sup>

597. Respondent did not even bother to address that offer and never replied to Claimant's counsel's earnest proposal. To have Respondent cry foul because it claims that, under the guise of the wrong provisions, the consent to predicate of amicable discussions was not met is the apogee of duplicity and pettifoggery.

598. Finally, in addition to the factual, legal, and ethical arguments mentioned above, Claimant wishes to provide the Arbitral Tribunal with evidence of an empirical nature demonstrating that Respondent does not wish to negotiate. If Colombia is genuinely interested in consultations and negotiations:

**Claimant hereby declares herself available to meet with Respondent's representatives at their convenience prior to the Hearing on Jurisdiction to consult and negotiate a settlement of the present dispute.**

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<sup>332</sup> *Id.*

599. Claimant looks forward to Respondent's reaction.

**h. Specific Remarks with Respect to Each Defense Under the TPA**

600. For the sake of completeness and to demonstrate to the Tribunal that Respondent's defenses are groundless irrespective of the treaty analyzed, Claimant will now address, separately, each of the two defenses *ratione voluntatis* under this section.

**i. Issues of Interpretation and Use of Precedent**

601. Claimant insists that the Rule of interpretation under Article 31 of the Vienna Convention of the Law of Treaties (VCLT) must be given some meaning and effect.

602. According to Article 31 VCLT a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in addition to, of course, any relevant rules of international law applicable in the relations between the parties.

603. Respondent here is simply acting in bad faith. It is unfortunate that this Tribunal has been presented with "analysis" of this nature and quality.

## j. Consultation and Negotiation

604. The relevant provision under the TPA (i.e., the wrong treaty with respect to this issue) reads as follows:

Article 10.15 In the event of an investment dispute, the claimant and the respondent **should initially** seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

(emphasis supplied).

605. There is no predicate mandatory requirement under this provision. It provides no rational basis for seeking dismissal of a proceeding.

606. The language is incontrovertible. Article 10.15 does nothing more than suggest what, in general, would be a desirable rule of engagement i.e. consulting and negotiating prior to commencing formal proceedings. Unsurprisingly, there is no sanction attached to a failure to consult and negotiate. No reasonable good faith analysis can provide a basis for inferring that this provision represents a jurisdictional condition precedent.

607. Furthermore, the non-binding nature of the provision under (Art. 10.15) is confirmed by the very article itself under Art. 10.16.1 of the TPA:

*In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation....*

(emphasis supplied).

608. Article 10.16.1 leaves it to the appreciation and assessment of the disputing party to decide whether there is any credible chance of settling the dispute and, therefore, whether to attempt consultations and negotiations in the first place. That provision would be at odds with a binding and mandatory obligation to consult and to negotiate.

609. It is equally important to stress the following aspects of Article 10.15:

a. It does not indicate any period of time after which arbitration proceedings can be started. Hence, as already immediately apparent from the text of the provision:

- i. there is no obligation to consult and negotiate and
- ii. consultation and negotiation could be started at any time by the disputing parties if they so wish.

b. The provision addresses both parties in dispute, not just the Claimant. It reads: "In the event of an

investment dispute, the claimant **and** the respondent should initially seek [...].” There is no evidence on record of Respondent having tried to engage in consultation or negotiation with Claimant. In fact, the record shows the opposite. Despite the numerous opportunities to approach Claimant to discuss the present dispute, Colombia failed to do so.

As a result, assuming for the sake of argument that the provision at hand had a binding effect, which it obviously does not, Respondent could not in good faith have relied on a provision that Respondent itself has failed to honor. This would be in observance of a basic principle of law described with the Latin maxim *inadimplenti non est adimplendum* (i.e., a non-performing party cannot expect performance from the other party).

c. Article 10.15 addresses the disputing parties as “claimant” and “respondent” while in other parts of Chapter 10 the parties in dispute are identified as the disputing parties.

610. That language corroborates a reading of the provision in line with Claimant’s position. Negotiation and consultation are not binding jurisdictional requirements and can be undertaken at any time, even during arbitration proceedings once the disputing parties technically have become “claimant” and “respondent.” Of course there would be a preference for such attempt to be carried out at



an early stage of the dispute, hence the use of the adverb *initially* in Article 10.15.

611. Respondent relies on three decisions to support its *ratione voluntatis* defense with respect to the alleged failure to consult and negotiate with Colombia prior to commencing arbitration proceedings. Citations are only offered with respect to one of those cases. The other two cases are referred to in a footnote linked to the following lapidary sentence at paragraph 288: “Tribunals have treated similar requirements of amicable settlement in other treaties as jurisdictional requirements.”

612. Those three cases are inapplicable because the relevant facts and legal provisions are different from the facts of this proceeding, as well as regarding the governing and the legal provisions upon which Respondent relies.

613. Instead of explaining why a case is relevant and how a finding should be applied to the present case, Respondent merely recites unrelated bits and pieces of findings from cases sharing little resemblance with the present dispute. In other words, Respondent provides a trite mantra of *dicta* that neither assists the Tribunal nor, indeed, its own case.

614. The main set of patchwork comes from the case of *Murphy v. Ecuador*, a case brought pursuant to the provisions of the US-Ecuador BIT.

Article VI of the US-Ecuador BIT provides in part as follows:

[...] 2. In the event of an investment dispute, the parties to the dispute **should initially** seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution [...]:

3. (a) **Provided that** the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date (sic) on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.

(emphasis supplied).

615. The provisions applicable in *Murphy v. Ecuador* set up a system that is not at all comparable to the dispute resolution provisions that Respondent wishes to apply to the present dispute. Here as well the “cut-and-paste” approach to legal analysis does not work.

616. Under the US-Ecuador BIT the contracting States designed a much more compelling scenario for the enforcement of the provision dealing with consultation and negotiation. The Parties to that BIT expressly agreed that arbitration proceedings could be commenced “provided” that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b), *and* that six months have elapsed.

617. It is possible to identify yet an additional element of separation between *Murphy v. Ecuador* material and the present arbitration. The dispute in *Murphy v. Ecuador* arose out of the implementation *erga omnes* of new legislation affecting the financial performance of a multitude of investors. In the case before this Tribunal, there was State action designed and developed *ad personam*.

618. That State action was complained about and was well-known to Colombia. In fact, Colombia itself through the very language of its own highest Tribunal of final appellate instance found against the State in favor of Claimant. The complaint pertaining to the action at issue was the Council of State’s papers seeking reconsideration of the Constitutional Court’s ruling.

619. The other two cases referred to as examples of disputes with “similar requirements” of

amicable settlement are *Salini v. Jordan* and *Enron v. Argentina*.

620. In *Salini v. Jordan*, Article 9 of the Italy-Jordan BIT in the relevant part states:

1- Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, **shall** be settled amicably, as far as possible.

2- In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.

3- In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to [...].

(emphasis supplied).

621. The facts and applicable provisions in *Salini* are totally different from the present case. Indeed, the Tribunal in *Salini* principally concerned itself with the application of Art. 9(2) because the

investment dispute arose out of a breach of a contract.

622. As concerns Article 9(1)(3) the Tribunal found:

100. The Tribunal recalls that there is no question as to the application of the dispute settlement mechanism provided for in Articles 9(1) and 9(3) in the event that there is an alleged breach of a provision of the BIT. *The point at issue in the present case is whether the mechanism is equally applicable to contractual disputes.* The Tribunal notes that ICSID Tribunals have taken divergent positions on this matter *in cases of alleged breaches of contracts* entered into between a foreign investor and a State Party to a BIT. But such is not the case in this instance. Indeed, the contract at issue was entered into between the Claimants and the Jordan Valley Authority, which under the laws of Jordan governing the contract, has a legal personality distinct from that of the Jordanian State (see para. 84 above). Now, one may doubt whether Articles 9(1) and 9(3) also cover breaches of a contract concluded in name between an investor and an entity other than a State Party, and

the Tribunal observes that several ICSID tribunals have already handed down decisions against such extensions of jurisdiction (see *Salini Costruttori and Italstrade v. Kingdom of Morocco*, case No. ARB/00/06, decision of 23 July 2001 on jurisdiction, paras. 60 to 62; *Consortium RFCC v. Kingdom of Morocco*, case No. ARB/00/06, Decision of 22 December 2003 on jurisdiction, paras. 67 to 69).

101. *However, the Tribunal will not be required to decide on whether Articles 9(1) and 9(3), taken in isolation, could cover the contractual disputes at issue in this instance. In fact, Article 9(2) of the BIT makes it obligatory to refer such disputes to the dispute settlement mechanisms provided for in the contracts and, where such disputes are concerned, excludes recourse to the procedure set forth in Article 9(3) for such disputes (see para. 60 above).*

(emphasis supplied).

623. Neither the factual matrix nor the relevant provision has *anything* to do with this case.

624. The dispute between Enron and Argentina was governed by the US-Argentina BIT. Those provisions are different from the provisions relied upon by Respondent under Chapter 10 of the TPA. Article VII(2) of the US-Argentina-BIT provided as follows:

2. In the event of an investment dispute, the parties to the dispute **should** initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution.

(emphasis supplied).

625. Similar to the US-Ecuador BIT, Article VII(3) of the US-Argentina BIT states:

(a) **Provided** that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement [...]

(emphasis supplied).

**k. Respondent Selectively Omits  
Relevant Parts of the Relevant  
Authority**

626. The reference to the case of *Enron* is contained at Footnote 630. It is there that Respondent points to paragraph 88 of the January 14, 2004 Decision on Jurisdiction as the relevant ruling.

627. In fact there is no actual ruling. The reason for the absence of a ruling supports Claimant's argument that Colombia is estopped from raising this *ratione voluntatis* defense.

628. In its hasty cut-and-paste, Respondent somehow failed to indicate that at paragraph 87 of that Decision on Jurisdiction, the Tribunal explained that observance of the consultation period in relation to additional *claims was not necessary because there was ample evidence that Argentina was not willing to negotiate*. Here is what the Tribunal explained:

87. The issue concerning the observance of the six-month consultation period becomes therefore moot. *If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve any new element, the observance of*



*this requirement is evidently fulfilled.*

This is particularly so in view of the fact that the Argentine Republic did not take advantage of the possibility of defusing the dispute during that start-up period.

(emphasis supplied).

629. Each and every case relied upon by Respondent was adjudicated on the basis of facts and treaties that were entirely different. This situation is not one where reasonable minds may draw different conclusions from the identical set of facts. Respondent flatly misrepresented the reasoning and content of the authority upon which it relied.

630. In its peculiar way of presenting and relying on case law, Respondent seems to miss a number of significant cases. A relevant holding can be found in the *Biwater Gauff v. Tanzania* award.<sup>333</sup> Art. 8(3) of the UK-Tanzania BIT, in the relevant part, provides:

(3) If any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then [...]

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<sup>333</sup> *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award), ¶343 -348.

631. The Tribunal interpreted that provision as follows:

343. [...] this six-month period is *procedural* and *directory* in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the time the Arbitral Tribunal considers the matter.

348. Waiver: Even if the six-month period in Article 8(3) constituted a strict condition precedent to this

Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims, the Arbitral Tribunal considers that any such condition was waived by the Republic, or cannot be relied upon by it, since it was the Republic's own actions in May to June 2005 (in particular, its public statements; deportation of City Water staff; and forced takeover of the Project) that effectively precluded any possibility of negotiation between the parties.

(emphasis supplied).

632. In the well-known case of *Lauder v. Czech Republic*<sup>334</sup> the Tribunal was asked to enforce the following provision under Art. VI of the BIT entered into in 1991 by the US with the then Czechoslovakia:

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation [...]. Subject to paragraph 3 of this Article, if the dispute cannot be resolved

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<sup>334</sup> Ronald S. Lauder v. Czech Republic UNCITRAL (Final Award), ¶186–190.

through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures; any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws and applicable international agreements regarding enforcement of arbitral awards.

3. (a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration [...].

633. The Tribunal found as follows:

187. However, the Arbitral Tribunal considers *that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the*

*merits of the dispute, but a procedural rule that must be satisfied by the Claimant (Ethyl Corp. v. Canada, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74-88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.*

188. [...] *there is no evidence that the Respondent would have accepted to enter into negotiation [...].*

189. *Furthermore, the Respondent did not propose to engage in negotiations with the Claimant following the latter's statement in his Notice of Consent of 19 August 1999, filed together with the Notice of Arbitration, that he remained "open to any good faith efforts by the Czech Republic to remedy this situation". Had the Respondent been willing to engage in negotiations with the Claimant, in the spirit of Article VI(3)(a) of the Treaty, it would have had plenty of opportunities to do so during the six months after the 19 August 1999 Notice of Arbitration.*

190. *To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in*

*the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.*

191. Therefore, the Arbitral Tribunal holds that the requirement of the six-month waiting period in Article VI(3)(a) of the Treaty does not preclude it from having jurisdiction in the present proceedings.<sup>335</sup>

(emphasis supplied).

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<sup>335</sup> The objective of pre-arbitration provisions was explained clearly by the Tribunal in *Alps Finance v Slovak Republic*, UNCITRAL, Award, CL-0148, with reference to one of the major authorities on investment arbitration:

204. However, as observed by the most prominent commentator of the ICSID Convention “the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution.

634. This reason represents the majority view on the issue. More importantly, it is the more thoughtful and better reasoned approach that focuses on substance over form and for this reason best furthers the greater interest of public international law as a whole.

### **3. The Notice of Intent**

635. At paragraph 287 of its Answer, Respondent argues that Claimant has not observed the notice of intent provision under *Art. 10.13.2* of the TPA. That reference is inaccurate and likely just a typographical mistake. Respondent is in fact referencing Art. 10.16.2 of the TPA.

636. Article 10.16.2:

At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration.

637. As already pointed out many times, the dispute resolution provisions under Chapter 10 of the TPA are not applicable to this case. This dispute is being arbitrated under the dispute resolution provisions (Articles 11 and 12) of the Colombia-Switzerland BIT.

638. The Colombia-Switzerland BIT does not contain any provision to the effect that a prospective claimant must deliver to the prospective Respondent a written notice of intention to submit the claim to arbitration. Therefore, Respondent's defense is just simply misplaced.

639. In any event, even if the TPA dispute resolution provisions applied to this case, which they do not, Art. 10.16.2 is not enforceable as Respondent suggests. The provision's objective is to ensure that due notice is supplied to the prospective Respondent regarding the (i) knowledge concerning an imminent claim, and (ii) details pertaining to both the prospective claimant and to the claim itself.

640. All of that information was readily available to Colombia well before this arbitration commenced.

641. It would be unfair to Claimant and to the very legitimacy of the proceeding itself if Colombia could rely on a formalistic reading of a treaty provision despite conclusive evidence that the provision's single objective was achieved. Moreover, the provision under Article 10.16.2 does not apply to the present case.

642. Here, again, a final reference to Respondent's cut-and-paste approach to use of precedent is in place.



643. The first case relied upon by Respondent is *Western Enterprise v. Ukraine*. Two issues command attention.

644. The Tribunal in that case acknowledged that the objective of a notice of intent is to allow the State to examine and possibly resolve the dispute by negotiation. Therefore, where the defendant State has been aware of the dispute and has not demonstrated an attitude that would provide a basis for good faith settlement negotiations, delivering a notice of intent becomes moot and futile.<sup>336</sup>

645. The Tribunal in *Western Enterprise* rejected Respondent's contention that want of a notice of intent should result in the action being dismissed.<sup>337</sup>

646. In yet another instance of "selective" cut-and-paste citation, Respondent failed to mention the most important part of the "Order" issued by the Tribunal in *Western Enterprises*.

647. The Tribunal had directed the parties to attempt negotiations and did not reject the action for lack of consent. *In fact, the Arbitral Tribunal stated that lack of notice did not affect jurisdiction!* The relevant part of the Tribunal's Order compels reading in its entirety:

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<sup>336</sup> RL-0049.

<sup>337</sup> *Id.* ¶¶ 7-8.

5. Proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations.

6. *Proper notice of the present claim was not given.*

7. *This conclusion does not, in and of itself, affect the Tribunal's jurisdiction. The Claimant should be given an opportunity to remedy the deficient notice. On the other hand, the proceedings should not be indefinitely suspended.*

8. Accordingly, the Tribunal invites the Claimant to (A) furnish evidence within 30 days of this Order that it has given proper notice to the Respondent, and (B) indicate to the Tribunal within 30 days + 6 months, if the Claimant wishes to pursue the Claim. The proceedings will be suspended during 6 months from the date of any proper notice furnished to the Tribunal in accordance with (A), unless both sides agree to reactivate the proceedings earlier.

(emphasis supplied).

648. The Tribunal's finding according to which failure to deliver notice of intent *did not* affect jurisdiction, is particularly important. It now becomes clear why Respondent did not disclose the entirety of the proposition for which the case stands.

649. In *Western Enterprise* the claim was brought under the provisions of the US-Ukraine BIT. That BIT, at Article VI(3), reads:

(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration

[...]

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

650. That treaty provision is not uncommon. In fact it pervades many cases on which Respondent relies. Non-observance of pre-arbitration procedures, even in instances where the treaty wording is mandatory, which is not the case here, does not result in lack of jurisdiction.

651. The second case on which Respondent relies is *Burlington v. Ecuador*. The relevant dispute resolution provision states:

2. In the event of an investment dispute, the parties to the dispute *should* initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned *may choose* to submit the dispute, under one of the following alternatives, for resolution: [...]

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration [...].

(emphasis supplied).

652. First, Respondent expressly stated at paragraph 289 of the Counter-Memorial that the above-mentioned provision, which is a *very* common provision, “did not expressly require any obligation to notify the respondent six months before submitting the dispute to arbitration [...]”

653. Second, Respondent conflates arguments relating to the delivery of a notice of intent with arguments pertaining to a six-month cooling off period.

654. Third, the Tribunal focused its analysis on the importance of the six-month cooling off period to provide the Respondent State with an opportunity to assess the claim and possibly to redress it.

655. The Tribunal raised that concern with respect to a dispute for breach of the protection and security treatment protection standard, which Claimant had failed to raise prior to the filing of the Request for Arbitration:

311. The Tribunal agrees that the Request for Arbitration adequately apprises Respondent of a dispute in relation to its protection and security obligation in Block 24 due to the opposition of the indigenous communities. In the Request, after briefly describing the problem of the opposition of the local indigenous communities in the Block, Claimant concludes that ‘Ecuador has failed to provide [to Burlington] any real support in resolving the problems, and has failed to provide security to

Burlington's installations, personnel and hydrocarbons activities.'

312. However, the Request for Arbitration is too late a time to apprise Respondent of a dispute. The six-month waiting period requirement of Article VI is designed precisely to provide the State with an opportunity *to redress* the dispute before the investor decides to submit the dispute to arbitration. Claimant has only informed Respondent of this dispute *with the submission* of the dispute to ICSID arbitration, thereby depriving Respondent of the opportunity, accorded by the Treaty, to redress the dispute *before* it is submitted to arbitration.

(emphasis supplied).

656. The case brought by Claimant here is materially different. As explained in the introductory part of this section, Colombia was aware of the dispute, it knew every aspect of the dispute, and squandered every opportunity to address and to settle the situation.

657. In the *Burlington v. Ecuador* case, the claims arose out of (i) the implementation of a new law affecting the hydrocarbons market and (ii) the oppositions of local indigenous communities with

respect to which Burlington developed its claim for breach of the protection and security obligation. The type of redress applicable to and sought in that case entailed more than the payment of compensatory damages.

658. The new law, by definition, was a measure issued *erga omnes* and Ecuador could not fathom whether and to what extent the new law could affect foreign investors.

659. The alleged breach of the protection and security obligation arose out of activities that Ecuador could be made accountable for but those activities had not been carried out by Ecuador itself. Ecuador knew little, if anything, about the disturbances and was not aware of a dispute as such. The entire factual matrix is poles apart from the case before this Tribunal.

660. In *Burlington v. Ecuador* the necessity of making the host-State aware of the existence of a dispute and the nature of the dispute was very much alive and in play. That is not the case in this arbitration. Here the host-State itself implemented *ad hoc* strategies aimed at expropriating Claimant's investment and the nature of the dispute was known to Colombia. Colombia's executive branch of government initiated a crisis within its own judiciary by causing the Constitutional Court to usurp the jurisdiction of its peer tribunal of equal hierarchy, the Council of State. "Notice" and "awareness" were not at issue.

661. In footnote 625 of its Counter-Memorial, Respondent also references the decision *Supervision y Control v. Costa Rica*. Respondent does not articulate any argument in connection with the citation:

662. In order to assist the Tribunal Claimant here highlights aspects of that dispute that are relevant to this proceeding.

663. The dispute was brought under the provisions of the Spain-Costa Rica BIT. In the relevant part, that BIT provides as follows:

ARTICULO XI Controversias entre una parte contratante e inversores de la otra parte contratante 1°-Toda controversia relativa a las inversiones que surja entre una de las Partes Contratantes y un inversor de la otra Parte Contratante respecto a cuestiones reguladas por el presente Acuerdo *será [shall] notificada por escrito, incluyendo* una información detallada, por el inversor a la Parte Contratante receptora de la inversión. En la medida de lo posible, las Partes en controversia tratarán de arreglar estas diferencias mediante un acuerdo amistoso.  
2°-Si la controversia no pudiera ser resuelta de esta forma en un plazo de



seis meses a contar desde la fecha de notificación escrita mencionada en el párrafo 1, el inversor podrá remitir la controversia [...].

(emphasis supplied).

664. This provision is completely different from the provisions under the Colombia-Switzerland BIT on which Claimant relies. It *also* is materially different from the dispute resolution provision in Chapter 10 of the TPA that Colombia would like to have applied to apply to this case.

665. At Footnote 630 of Respondent's Counter-Memorial, reference is made to *Enron v Argentina*. That case was brought under the US-Argentina BIT. The relevant provision already has already been discussed, but it will be referenced here to facilitate consultation:

2. In the event of an investment dispute, the parties to the dispute *should* initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned *may* choose to submit the dispute for resolution [...]

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six

months have elapsed from the date on which the dispute arose, the national or company concerned *may* choose to consent in writing to the submission of the dispute for settlement by binding arbitration [...].

(emphasis supplied).

666. The recurring misleading citations on plain propositions is discouraging and disconcerting. More so because Claimant commenced every single legal analysis in its Initial Memorandum and in this reply by disclosing and discussing “adverse” authority.

667. As already suggested, even in the presence of a treaty employing language seemingly compelling (“provided that”) the *arbitral Tribunal recognized that the circumstances of the case should be taken into account to establish whether the six month consultation period should be enforced*. The relevant language again restated for ease of reference is as follows:

87. The issue concerning the observance of the six-month consultation period becomes therefore moot. *If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve*

*any new element, the observance of this requirement is evidently fulfilled. This is particularly so in view of the fact that the Argentine Republic did not take advantage of the possibility of defusing the dispute during that start-up period.*

(emphasis supplied).

668. The Tribunal in *Bayindir Insaat Turzim v Pakistan*,<sup>338</sup> adopted the identical approach. As observed (at ¶ 80) the Pakistan-Turkey BIT provided in the relevant part:

1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his or her investment, *shall be notified* in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party *shall endeavor* to settle these disputes by consultations and negotiations *in good faith*.
2. If these disputes, cannot be settled in this way within six (6) months

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<sup>338</sup> *Bayindir Insaat Turzim v Pakistan*, ICSID Case No. ARB/03/29 (Decision on Jurisdiction) ¶¶95-102, CL-0012.

following the date of the written notification mentioned in paragraph I, the disputes can be submitted, as the investor may choose, to [...].

(emphasis supplied).

669. Despite the presence of compelling language in the form of mandatory verb “shall” the Tribunal correctly interpreted the provision in harmony with scope and objectives of notifications and cooling off periods.

670. The objective of such provisions is to create an opportunity for settlement. Therefore, where, as here, it is amply established that the parties are (i) aware of the dispute, and (ii) unlikely to settle, insisting on carrying out the formalities contained in the BIT becomes unhelpful, counterproductive, and against the BIT’s very objectives. The Tribunal found as much and even Respondent Pakistan, on the point of principle, was in agreement:

98. The Tribunal notes that Pakistan has not denied that the main purpose of Article VII of the BIT is to provide for the possibility of a settlement of the dispute. In the Tribunal’s view, the purpose of the notice requirement is to allow negotiations between the parties which may lead to a settlement. Significantly, Article VII(2) does not

read, if these disputes ‘are not settled’ within six months but ‘cannot be settled’ within six months, which wording implies an expectation that attempts at settlement are made. Faced with a similar situation, the tribunal in *Salini v. Morocco* refused to adopt a formalistic approach and stated that an attempt to reach amicable settlement implies merely ‘the existence of grounds for complaint and the desire to resolve these matters out-of court.’

99. *Pakistan itself admits that the notice requirement cannot constitute a prerequisite for jurisdiction when the necessary ‘steps [...] are impossible to take in the circumstances of the case.’*

100. *The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan’s position, the non-fulfilment of this requirement is not ‘fatal to the case of the claimant.’ As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one’s advantage.*

(emphasis supplied).

671. As in the case before this Tribunal, in *Bayindir v. Pakistan* the host-State had been made aware of the dispute with the foreign investor but did nothing to suggest even the possibility of settlement discussions.

102. *The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate. In the Tribunal's view, if Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002<sup>36</sup>. Along the lines of the award rendered in *Lauder v. The Czech Republic*, the Tribunal is prepared to find that preventing the commencement of the arbitration proceedings until six months after the 4*

*April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties and hold 'that the six-month waiting period in [the BIT] does not preclude it from having jurisdiction in the present proceedings.'*

103. As a result of this conclusion, the Tribunal will not discuss Bayindir's additional argument pursuant to which it would be entitled to disregard the notice requirement of Article VII of the BIT by virtue of the operation of the most favoured nation clause contained in Article II(2) of the BIT.

(emphasis supplied).

672. Another example of how notices of intent have been construed by arbitral tribunals is

found in *B-Mex v Mexico*.<sup>339</sup> In that case the Arbitral Tribunal was confronted with the task of applying Art. 1119 of NAFTA Notice of Intent to Submit a Claim to Arbitration:

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice *shall* specify:

- (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

673. The Tribunal addressed the issue whether an additional Claimant in the proceedings should have provided the Respondent State with a

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<sup>339</sup> *B-Mex v Mexico*, ICSID Case No. ARB(AF)/16/3, (Partial Award) (July 19, 2019) ¶¶ 77-113, CL-0155.



notice of intent to start proceedings. The Arbitral Tribunal dealt with the issue as follows:

79. As set out below, the Tribunal finds that Article 1119 does not condition the Respondent's consent to arbitration in Article 1122 and that the Additional Claimants' failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.

[...]

81. *First, Article 1119 is stated in mandatory terms: "shall". However, it is entirely silent on the consequences of a failure to include all the required information in the notice of intent. Article 1119 does not in terms refer to Article 1122(1); does not provide that satisfaction of the requirements of Article 1119 is a condition precedent to the NAFTA Party's consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA Party's consent. The text of Article 1119 therefore does not compel the conclusion that a failure to include all the required information in the Notice of Intent vitiates a NAFTA Party's consent under Article 1122(1).*

[...]

97. *Filing a notice of intent is, put at its highest, a “procedure” to be followed prior to an arbitration, if any; it is not a procedure with which the subsequent arbitration itself, must accord.*  
[...]

(emphasis supplied).

674. The Tribunal was very direct in holding that consent was not at all premised on the filing of a notice of intent. In so holding the Tribunal observed that, notwithstanding a mandatory “shall,” there was no textual support suggesting that failure to do so compels dismissal. The Tribunal’s reasoning is relevant:

675. This reasoning is hardly an outlier decision. A similar finding was reached in *Chemtura Corporation v. Government of Canada*.<sup>340</sup> There the issue addressed was whether a notice of intent that contained some but not all the claims that were subsequently developed during the arbitration gave rise to lack of consent:

103. [...] *It is true that the main argument made in such notices in connection with Article 1103 did not*

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<sup>340</sup> *Chemtura Corporation v. Government of Canada*, UNCITRAL (Award) ¶¶102-105, CL-0017.

*concern the potential import of a fair and equitable treatment provision from another treaty through the MFN clause in Article 1103. Yet, the facts mentioned therein are essentially the same as those subsequently referred to in the Claimant's Memorial in support of the claim under Article 1103.*

*104. More fundamentally, the fact that the Claimant may have advanced arguments in its Memorial which were not spelled out in its previous submissions in connection with Article 1103 has not caused any prejudice to the ability of the Respondent to respond to such arguments. Indeed, the Respondent has had ample opportunity to state its position, and has done so in its briefs and at the hearings.*

(emphasis supplied).

676. Other Tribunals have addressed similar and related issues and found along the lines of the decision in *Chemtura*.<sup>341</sup>

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<sup>341</sup> Among others, these cases are *Ethyl Corporation v. Canada*, UNCITRAL (Decision on Jurisdiction) ¶90, CL-0168;

677. Therefore, it is understandable that Respondent would attempt, almost feverishly, to avoid a merits hearing “at all costs.” Despite this sense of urgency, the mischaracterization of language and the selective “cut-and-paste” use of authority to avert *disclosing* a Tribunal’s actual holding and reasoning, find no justification.

678. The Parties consented to this proceeding as framed. They have reasoned and held no differently from *Chemtura*.<sup>342</sup>

679. Respondent in this case faces considerable liability ranging conservatively from USD 400 million to USD one billion in compensatory damages. Perhaps of even greater concern to Respondent is exposing the fragility of its judiciary to the universe of investors and to the community of nations.

680. In an untenable and plainly indefensible usurpation by one tribunal of final appellate recourse of the jurisdiction of a peer tribunal of equal hierarchy.

#### **4. Consultation and Negotiation (Article 10.15) and Formal Notice of Intent (Article 10.16.2)**

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and *Khan Resources v. Government of Mongolia*, PCA Case No. 2011-09 (Decision on Jurisdiction) ¶¶404-409, CL-0179.

<sup>342</sup>

681. Respondent alleges that Claimant failed to comply with (i) the consultation and negotiation provision in Article 10.15<sup>343</sup> and (ii) the notice of intent provision in Article 10.16 of the TPA.<sup>344</sup>

682. As a predicate to analyzing the technical merits of the defenses, the following clarifications are necessary.

**a. The Dispute Resolution Provisions of the Colombia-Switzerland BIT Apply to This Arbitration**

683. Claimant apologizes to the Tribunal for having to repeat that the present claim is brought pursuant to Chapter 12 of the TPA and not Chapter 10. Pursuant to Article 12.3 of the TPA, Claimant imports the more favorable dispute resolution provisions offered under Articles 11-12 of the Colombia-Switzerland BIT.

684. As such, whether Claimant was expected to initiate consultations and negotiations or whether she was expected to provide Respondent with a notice of intent must be ascertained with reference to the provisions under Article 11 of the Colombia-Switzerland BIT.

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<sup>343</sup> See Respondent Counter Memorial ¶¶ 283-285.

<sup>344</sup> See Respondent Counter Memorial ¶¶ 286-290.

I. **Consent to Arbitration under Article 11 of the Colombia-Switzerland BIT is Unconditional**

685. Article 11 in part reads:

Article 11 Settlement of disputes between a Party and an investor of the other Party

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he **may** request consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of written request for consultations **may** be referred to the courts or administrative tribunals of the Party concerned or to international arbitration [...]

(3) Each Party hereby gives its **unconditional and irrevocable consent to the submission of an investment dispute to international arbitration** in accordance with paragraph 2 above,

except for disputes with regard to Article 10 paragraph 2 of this Agreement.

(emphasis supplied).

686. Article 11(3) states that consent to arbitration under the Colombia-Switzerland BIT is unconditional.

687. Article 11 does not prescribe or mandate the (i) the attempt or participation in consultations, or (ii) require a notice of intent to be delivered the prospective Respondent. It does not condition consent to arbitration on either requirement. At best, Article 11 prescribes a *permissive* standard concerning consultations. It permits parties to engage in consultation before the filing of a claim.<sup>345</sup>

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<sup>345</sup> The Colombia-Switzerland BIT is a good example of clear treaty drafting, particularly with respect of the correct use of modal verbs. Article 11 of that BIT is no exception.

Where the contracting Parties wished to establish an option or a choice for the benefit of the relevant recipient of the provision they, correctly, used the modal verb “may.”

Where the contracting Parties wished to establish a firm and binding obligation, they used the modal verb “shall.”

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To illustrate this:

Article 11(1) of the Colombia-Switzerland BIT states that if an investor considers that a measure applied by the host State is inconsistent with an obligation under the BIT:

[...] he **may** request consultations with a view to resolving the matter amicably.

(emphasis supplied).

Comparing that provision with other provisions of a different nature and effect under the same Article 11, one provision is directed at the foreign investor and two provisions are directed at the contracting Parties. Article 11(4) states:

Once the investor has referred the dispute to either a national tribunal or any of international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure **shall be final**.

(emphasis supplied).

As regards the obligation of the contracting States, the following two provisions are enlightening:

Article 11(6)

The Party which is party to the dispute **shall at no time whatsoever** during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

**Neither Party shall pursue** through diplomatic channels a dispute submitted to



688. Respondent's defense *ratione voluntatis* in this respect is just meritless and is consistent with a pleading practice that raises every existing cognizable defense, irrespective of merits or applicability.

**b. Respondent's Objections Never Should Have Been Raised**

689. Even assuming that the requirement of Consultation and Negotiation (Article 10.15 of the US-Colombia TPA) (the "Consultation Stipulation") and Notice of Intent (Article 10.16 of the US-Colombia TPA) (the "Notice Stipulation") were to apply, Respondent's two objections fail as a threshold matter issue.

690. The sole objective of the notice and consultation provisions is to facilitate settlement negotiations before the dispute is submitted to arbitration.

691. In considering the significance of a similar type consultation stipulation, the Tribunal in *Biwater Gauf (Tanzania) v Tanzania* held that:

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international arbitration unless the other Party does not abide by and comply with the arbitral award.

(emphasis supplied).

*“this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible.”*<sup>346</sup> Similarly, the tribunal in *Abaclat and others v Argentine Republic* held that: “the consultation requirement set forth in Article 8(1) BIT is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way... it also derives from the general purpose and aim of such provision, which is to allow amicable settlement where such settlement is wanted and supported by both parties”.<sup>347</sup> (emphasis supplied).

692. In considering the significance of a similar type notice stipulation, the Tribunal in *Bayinder Insaat Turzim v Pakistan* held that “the requirement of notice...should not be interpreted as a precondition to jurisdiction...In the Tribunal’s view, the purpose of the notice requirement is to

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<sup>346</sup> *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award), ¶343 -347 CL-0154.

<sup>347</sup> *Abaclat and others v Argentine Republic* ICSID Case No. ARB/07/05, Decision on Jurisdiction, ¶564-565 RL-0065.

allow negotiations between the parties which may lead to a settlement”.<sup>348</sup>

693. Respondent has been well aware in considerable detail of the facts underlying this dispute for some time prior to the filing of this pleading. It is estopped from now claiming that it is somehow disadvantaged, let alone that it did not consent to arbitration under these circumstances.

694. This dispute has been going on for a number of years. Claimant has attempted on multiple occasions to create the conditions for settlement. Respondent would have none of it.

**c. Consultation Stipulation in TPA does not condition the tribunal’s jurisdiction to hear the claim**

695. The Respondent argues that “because the Claimant failed to satisfy the condition of consent in Article 10.15...the Tribunal lacks jurisdiction *ratione voluntatis*”.<sup>349</sup> Article 10.15 of the US-Colombia TPA, reads as follows:

Article 10.15 In the event of an investment dispute, the claimant and the respondent **should initially** seek to

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<sup>348</sup> Bayindir Insaat Turzim v Pakistan, ICSID Case No. ARB/03/29 (Decision on Jurisdiction), ¶95-102 CL-0012.

<sup>349</sup> Respondent’s Counter Memorial, ¶286.

resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

(emphasis supplied).

696. The Respondent's argument is a complete mischaracterization of the function and nature of the Consultation Stipulation, and it must be dismissed for the following reasons.

697. Article 10.15 is a not mandatory, condition precedent, let alone a "jurisdictional requirement" as Respondent argues<sup>350</sup>. Article 10.15 of the TPA does nothing more than suggest what, in general, would be a desirable rule of engagement i.e. consulting and negotiating prior to commencing formal proceedings. Unsurprisingly, there is no sanction attached to a failure to consult and to negotiate. No reasonable good faith analysis can provide a basis for inferring that this provision represents a jurisdictional condition precedent.

698. The non-binding nature of the Consultation Stipulation is evidenced in the plain wording of Art. 10.5 and the succeeding Art. 10.16.1 of the TPA.

699. Article 10.15 in part provides that "the claimant and the respondent **should initially** seek

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<sup>350</sup> Respondent's Counter Memorial, ¶285.

to resolve...” and thus sets an aspirational, permissive standard to the Consultation Stipulation. It presumes consultation to be a mutually cooperative effort between the Parties.

700. Article 10.16.1 underscores the discretionary, permissive, and flexible nature of the consultation and negotiation process (“in the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation...”).

701. Hence, as immediately apparent from the text of the TPA that (i) there is mandatory prescription to consult and negotiate, and (ii) therefore, the Tribunal’s jurisdiction is not contingent on a permissive party based discretionary matter.

702. Respondent does not entertain Claimant’s overtures to explore a settlement.

703. The Request for Arbitration in the parallel PCA proceedings was accompanied by a letter dated January 24, 2018. In that correspondence Respondent explicitly was invited to explore settlement discussions. The letter, in pertinent part, reads:

Should you care to discuss any possible non-arbitral settlement of this proceeding, please feel free to contact me at your pleasure. We opine that

going forward settlement opportunities, at least from claimants' perspective, shall indeed dwindle<sup>351</sup>.

704. Respondent never replied to Claimant's counsel's proposal to discuss settlement. Yet Respondent now cries foul.

705. Because the Consultation Stipulation contemplates a bilateral cooperative effort, tribunals have held that the failure or unwillingness of either party to engage in the efforts waives its right to invoke the Consultation defense. Put simply, it cannot be used as a sword and shield. In *Biwater Gauff v Tanzania*, the tribunal held that<sup>352</sup>:

Even if the six-month period in Article 8(3) constituted a strict condition precedent to this Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims, the Arbitral Tribunal considers that any such condition was waived by the Republic, or cannot be relied upon by it, since it was the Republic's own actions in May to June 2005 (in particular, its public statements; deportation of City Water

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<sup>351</sup> C-0038.

<sup>352</sup> 2008: *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award), ¶¶343 -347 CL-0154.

staff; and forced takeover of the Project) that effectively precluded any possibility of negotiation between the parties.

706. Other tribunals have refrained from sanctioning claimants for the alleged failure to engage in consultations, where the Tribunal found the futility of such requirements to be attributable to the Respondent. In *Enkev Beheer v Republic of Poland*, is a perfect example. There the tribunal held that:<sup>353</sup>

320. Finally, this is not a case where the Claimant has ever deliberately shied away from pressing its case whenever, wherever or to whomsoever it could in Poland. If the Respondent had even opened the door half ajar to any amicable discussions regarding the Claimant's own particular claim (as distinct from *Enkev Polska*), the

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<sup>353</sup> *Enkev Beheer BV v Republic of Poland*, PCA Case No. 2013-1 First Partial Award, ¶315-323 CL-0167-A. Also see: 2001: *Ronald S. Lauder v Czech Republic* UNCITRAL (Final Award), ¶186 –190 CL-0231; 2009: *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, Stockholm Chamber of Commerce Case No. V 064/2008 Partial Award on Jurisdiction and Liability, ¶155; 2011 CL-0189-B. *Abaclat and others v Argentine Republic* ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, ¶564-565; 2011 RL-0065: *Alps Finance v Slovak Republic*, UNCITRAL, Award, ¶201-211 CL-0148.

Claimant would have seized that opportunity without any hesitation. Hence, in the Tribunal's view, this is manifestly not a case where a claimant has consciously defied its obligation to engage in amicable discussions with the host State.

321 With these cumulative explanatory factors, the Tribunal considers that it would not be right to construe the terms of Article 8 of the Treaty as barring absolutely the Claimant's claims in this arbitration as a matter of jurisdiction; nor, for the same reason and on the facts of this case, to consider such claims inadmissible as regards the exercise of jurisdiction by this Tribunal. Having regard to the object and purpose of Article 8 under Article 31 of the Vienna Convention on the Law of Treaties, given also the context of the Treaty intended (by its preamble) expressly to encourage and protect foreign investments in Poland, the Tribunal decides that the over-strict meaning, for which the Respondent contends, is too semantic in its approach and unduly harsh in its result. This is particularly so where the Claimant's non-compliance is only



formalistic and where the Respondent has suffered no prejudice which could not be compensated by an appropriate order by this Tribunal for legal and arbitration costs unnecessarily incurred or wasted by reason of the Claimant's undue haste in commencing this arbitration.

707. The Respondents' right to invoke the Consultation Stipulation must be deemed to have been waived by its own conduct. In any event, it would be less than equitable to convert the permissive into mandatory, and to reward Respondent's unwillingness to explore settlement by sanctioning Claimant.

708. Tribunals consistently have affirmed that permissive consultation stipulations should be treated as procedural directives. Even in instances of non-compliance, the tribunal will not be precluded from examining the claim.

709. In *Biwater Gauff v. Tanzania*,<sup>354</sup> the tribunal affirmed this flexible approach to the

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<sup>354</sup> *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Award), ¶¶343 -348.

enforcement of a similarly structured consultation stipulation<sup>355</sup>.

343. [...] this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six month period has elapsed by the

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<sup>355</sup> UK-Tanzania BIT Art. 8.3: “If any such dispute should arise and agreement cannot be reached within six months [...]”

time the Arbitral Tribunal considers the matter.

710. Similarly, in the well-known case of *Lauder v Czech Republic*<sup>356</sup> the Tribunal was asked to enforce a similar consultation provision under Article IV of the US-Czech Republic BIT<sup>357</sup>. The Tribunal found as follows:

187. However, the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article

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<sup>356</sup> Ronald S. Lauder v. Czech Republic UNCITRAL (Final Award), ¶186–190 CL-0231.

<sup>357</sup> Article IV(2) US-Czech BIT:

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation [...]. Subject to paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures; any dispute-settlement procedures, including those relating to expropriation, specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws and applicable international agreements regarding enforcement of arbitral awards.

3. (a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration [...].

VI(3)(a) of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (*Ethyl Corp. v. Canada*, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74-88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.

188. [...] there is no evidence that the Respondent would have accepted to enter into negotiation [...].

189. Furthermore, the Respondent did not propose to engage in negotiations with the Claimant following the latter's statement in his Notice of Consent of 19 August 1999, filed together with the Notice of Arbitration, that he remained "open to any good faith efforts by the Czech Republic to remedy this situation". Had the Respondent been willing to engage in negotiations with the Claimant, in the spirit of Article VI(3)(a) of the Treaty, it would have had plenty of opportunities to do so

during the six months after the 19 August 1999 Notice of Arbitration.

190. To insist that the arbitration proceedings cannot be commenced until 6 months after the 19 August 1999 Notice of Arbitration would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.

191. Therefore, the Arbitral Tribunal holds that the requirement of the six-month waiting period in Article VI(3)(a) of the Treaty does not preclude it from having jurisdiction in the present proceedings.<sup>358</sup>

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<sup>358</sup> The objective of pre-arbitration provisions was explained clearly by the Tribunal in *Alps Finance v Slovak Republic*, UNCITRAL, Award, with reference to one of the mayor authorities on investment arbitration. CL-0148.

204. However, as observed by the most prominent commentator of the ICSID Convention “the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending parties back to the

(emphasis supplied).

711. The approach in *Biwater Gauff v Tanzania* and *Lauder v Czech Republic* represents the majority view on the issue<sup>359</sup>. Even if the Tribunal concludes that the Consultation Stipulation was not satisfied, the penalty for this non-compliance is not claim preclusive. It is neither appropriate nor proportional consultation stipulations are merely procedural, permissive, and directory in nature.

**d. The Cases on Which Respondent Relies Are Contrary to the Proposition for Which They Are Cited**

712. As a preliminary remark, the Respondent did not care to explain the relevance of the cases on which it relies. Respondent cites to *Murphy v Ecuador* as an “example” of a Tribunal

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negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution.

<sup>359</sup> See also 1998: Sedelmayer v Russia, SCC Award, p.82, ¶313 RL-0046; 2013: Al Kharafi & Sons v Libya, Award, p.245-246 CL-0189-A.; 2014: Enkev Beheer BV v Republic of Poland, PCA Case No. 2013-1 First Partial Award, ¶315-323 CL-167-A.

treating consultation stipulations as a “mandatory requirement.” In that case, however, the Tribunal does not even go so far as to categorize consultation as “jurisdictional”, contrary to Respondent’s assertion. The Respondent merely cites to the other two cases on which it relies in a footnote.

713. Respondent’s reliance on three decisions only conclude incorrectly that the Consultation Stipulation is to be considered a “jurisdictional requirement” simply is misplaced.<sup>360</sup>

714. By way of example, *Murphy v Ecuador* is distinguishable on the facts. The Claimant’s non-action in that case was material to the tribunal’s holding:<sup>361</sup>

In the Tribunal’s opinion, the obligation to negotiate is an obligation of means, not of results. There is no obligation to reach, but rather to try to reach, an agreement. To determine whether negotiations would succeed or not, the parties must first initiate them. *The obligation to consult and negotiate falls on both parties, and it is evident that there were none in this case* because as has been reiterated above, on Friday, February 29, 2008

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<sup>360</sup> Respondent’s Counter Memorial Jurisdiction ¶284.

<sup>361</sup> *Murphy v Ecuador*, ¶134-139 RL-048.

Murphy International sent a letter to Ecuador stating that it had a claim against the Republic based on the BIT, and then on Monday, March 3, 2008, it submitted the Request for Arbitration to ICSID. Murphy International's conduct to decide, a priori and unilaterally, that it would not even try to resolve its dispute with Ecuador through negotiations constitutes a grave breach of Article VI of the BIT.

136. Moreover, what happened to other foreign oil companies does not support Murphy International's position that the negotiations with Ecuador would have been fruitless because of the impossibility to reach an agreement. On the contrary, the facts contradict this statement [...].

(emphasis supplied)

715. Unlike the claimant in *Murphy v Ecuador*, Claimant here has attempted the initiation of negotiations multiple times, only to be repeatedly ignored by the uninterested Respondent. There was no evidence that Respondent would engage.

716. Non-compliance with the BIT's consultation stipulation was not an issue in *Salini v Jordan*. The Tribunal was concerned with whether



the investor-state dispute settlement mechanisms in the material treaty would cover contractual disputes.

717. The tribunal only considered the article containing the consultation stipulation to determine the scope of the BIT's investor-state dispute mechanism<sup>362</sup>. There were no discussion regarding the effect of non-compliance with the consultation stipulation on the tribunal's jurisdiction<sup>363</sup>. *Salini v Jordan* is simply not relevant to the consultation issue here.

718. Lastly, Respondent relied upon *dictum* in *Enron v Argentina* to assert that the TPA's consultation stipulation is a jurisdictional requirement.<sup>364</sup> However, the *Enron* tribunal considered that "*the issue concerning the observance of the six-month consultation period... moot*" and was actually concerned with "*the much simpler question whether the action of [respondent] further extending the same dispute already registered requires a separate registration and procedure*".<sup>365</sup> Further, as submitted above,

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<sup>362</sup> *Salini v Jordan*, ¶97-101, CL-0233..

<sup>363</sup> See *Salini v Jordan*, ¶16, as cited by Respondent in fn 629 of its Answer, which says that there were consultation between the claimant and respondent CL-0233.

<sup>364</sup> See Respondent's Counter Memorial on Jurisdiction, footnote n. 619 citing *Enron v Argentina* ¶88 .

<sup>365</sup> *Enron v Argentina* ¶¶86 & 87.

whether a consultation stipulation is a jurisdictional requirement is a matter of interpretation. The US-Argentina BIT's investor-state dispute mechanism discussed in *Enron v Argentina* is substantially different from that of the TPA. The passing comment in *Enron v Argentina* made on the interpretation of a different set of provisions and without analysis should not and cannot be relied upon by the Tribunal.

719. The analysis on the Consultation Stipulation begins and ends with Claimant's reliance on the Colombia-Switzerland BIT, which has no such requirement. Case analysis further supports the proposition that the Consultation Requirement is not jurisdictional.

#### **A. The “Fork-in-the Road” Defense is Inapplicable**

720. Respondent argues that Claimant fails to satisfy the jurisdictional requirements of the dispute resolution clause of the Colombia-Switzerland BIT. According to Respondent, Claimant is precluded from bringing the present action by operation of the “Fork-in-the-Road” provision under Art. 11 of the Colombia-Switzerland BIT.<sup>366</sup>

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<sup>366</sup> Respondent's Counter Memorial ¶ 355.

721. Respondent's argument is not supported by law.

**1. Respondent's Fork-in-the-Road  
Objection Is Misplaced and Illogical**

722. Claimant's allegations here concern Respondent's breach of a number of investment protection treatment standards under customary international law and treaty law. These breaches were committed by the Colombian Constitutional Court and therefore directly are attributable to Respondent. It defies reason to argue that Claimant is barred from pursuing a remedy for a breach of investment protection because Claimant had allegedly been party to the Constitutional Court proceedings, which constitute the very breach of investment protection.

723. There are two elements to a fork-in-the-road objection: (i) an action *commenced* by the party against whom the fork-in-the-road provision is intended to be enforced; and (ii) the existence of an actual judicial alternative (the two alternative jurisdictions constituting the fork-in-the-road allegory). Neither element is present here.

724. Claimant was not party to the Constitutional Court proceedings. It was the company shareholders of Granahorrar (the "**Companies**") that participated in that action. Even, assuming for the sake of argument, that the Companies are Claimant's, the Companies did not

instigate the proceedings before the Constitutional Court. It was the Superintendency and FOGAFIN that filed.

725. At the time when FOGAFIN and the Superintendency commenced the Constitutional Court proceeding, the Companies had no need, let alone justification, to start any court action in Colombia. The Council of State had vindicated the Companies' rights. Pursuant to the 2007 judgment, the leading administrative court in Colombia had stigmatized the unlawful conduct of the Colombian financial authorities and had returned the Companies' investment in Granahorrar.

726. The Companies had no reason to start proceedings before the Constitutional Court. They were compelled to participate in fictitious predetermined proceedings with respect to which the Constitutional Court lacked jurisdiction. Neither the Companies nor, allegedly, Claimant, commenced the Constitutional Court proceedings. The first element of a fork-in-the-road objection is not present.

727. Further, the current proceedings were not an available judicial alternative to the Constitutional Court proceedings.

728. The application for reconsideration and annulment of the Constitutional Court Judgment SU-447 2011 was filed in December 2011, six months before the TPA came into force.

729. Since the TPA only came into force in May 2012, the current proceedings were not a judicial alternative to the Constitutional Court's proceedings. There were no options for the Companies, or allegedly Claimant, to exercise as part of the fork-in-the-road provision.

730. Preclusion of claims as a result of a fork-in-the-road provision cannot be asserted where the breach of a procedural or substantive standard of protection logically presupposes a judicial activity. There cannot be denial of justice without exhaustion of local remedies. The same principle applies to judicial expropriation, and FET.

**2. Respondent's Fork-In-The-Road  
Objection Fails as the Relevant  
Requirements are not Satisfied**

731. In addition, Respondent's objection is without merit because the relevant requirements of a fork-in-the-road objection are not present.

732. Article 11 of the Colombia-Switzerland BIT, in part, states:

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request

consultations with a view to resolving the matter amicably.

(2) Any such matter which has not been settled within a period of six months from the date of written request for consultations *may* be referred to the courts or administrative tribunals of the Party concerned or to international arbitration, in the latter event the investor has the choice between either of the following[...]

...

(4) Once *the investor* has referred *the dispute* to either national tribunal or any international arbitration mechanism provided for in paragraph 2 above, the choice of the procedure shall be final.

(emphasis supplied).

733. Colombia and Switzerland have adopted a fork-in-the-road provision relying on a three-prong test. Thus, in order for Respondent to rely successfully upon its fork-in-the-road objection, it must show that the parties, causes of action, and relief sought is identical to the investment arbitration proceedings and the court proceedings. Plainly, the (1) parties; and (2) causes of action are different.

734. Neither Claimant nor Respondent was a party to the Colombia court proceedings. The Colombian court proceedings before the administrative courts were between (a) Compto SA, Asesorías e Inversiones CG Ltda., Inversiones Lieja Ltda., Exult SA, Fultiplex SA, and IC Interventorías y Construcciones Ltda., and (b) the Superintendency and FOGAFIN.

735. The same parties appeared in the Constitutional Court proceedings *commenced by the Superintendency and FOGAFIN*. The President of the Council of State also took part in the second stage of the Constitutional Court proceedings that were brought to have the May 26, 2011 Judgment for breach of a treatment protection standard reconsidered or annulled.

736. None of the parties to the Colombian court and Constitutional Court proceedings are parties to this arbitration.

### **3. The Causes of Action Are Different**

737. The fork-in-the-road defense only can be triggered where the investor brought an action before domestic courts of the host-State. The TPA did not exist when the administrative court proceedings were initiated. These proceedings culminated on November 1, 2007 when the Council of State ruled in favor of the plaintiffs and against the Superintendency and FOGAFIN. In fact, the TPA did not exist when *FOGAFIN and the*

*Superintendency* commenced the proceeding before the Constitutional Court.

738. All proceedings in Colombia concerned Colombian law and not a breach of the TPA.

739. The Constitutional Court in its 2011 decision provides a comprehensive narrative of the operative causes of action and legal principles underlying that cause:

(i) 1.3.1. *Expiration of the action.* The plaintiffs (the Superintendency and FOGAFIN) argued that the ruling of the Council of State, Fourth Section, of November 1, 2007, incurred substantive and factual defects by entertaining an action that, in their views, had expired.

(ii) 1.3.2. *Lack of competence to make pronouncements on contractual matters, Organic Defect.* The Superintendency and FOGAFIN claimed that the Council of State arbitrarily had exceeded its jurisdiction by adopting decisions relating to contractual obligations such as the issue of whether FOGAFIN had violated its contractual obligation to "disburse" resources to Granahorrar.



(iii) 1.3.3 *"False motivation" of the actions being sued. Various Defects.* It was argued that the ruling of November 1, 2007, suffered from a lack of motivation inasmuch as the Fourth Section of the Council of State had not specified what were the reasons for the application of the normal procedure for the notification of documents.

(iv) 1.3.4. Regarding the damages. The Superintendency and FOGAFIN argued that the Council of State had failed to apply generally accepted principles concerning the necessary consistency between the claims of the suit and the decisions of the judgment.

740. These causes of actions and attendant defenses are foreign to this proceeding. Of course, there was no TPA before May 2012 and Claimant's current causes of action did not exist at the time when the Colombian court and Constitutional Court proceedings were taken out.

#### **4. Respondent's Legal Arguments Are Groundless and Misleading**

741. Colombia cuts and pastes neutral passages rendered from awards without regard to context or even the semblance of legal analysis. For example at paragraph 357 of its Counter

Memorial,<sup>367</sup> Respondent quotes language from the *Glencore v. Colombia* award where the Tribunal observed:

Arts. 11(2) and (4) contain a so-called ‘Fork-in-the-Road’ provision, which allows the investor to opt between different judicial or arbitral fora for the submission of an investment dispute, but prescribes that once that election has been made, it becomes final and irrevocable – *electa una via non datur recursus ad alteram*.

742. That language is just an unremarkable scholastic definition of fork-in-the-road.

743. As observed above, Respondent’s fork-in-the-road objection fails to comply with the requirements set out in the Colombia-Switzerland BIT.

744. The vast majority of tribunals have upheld the principle codified in the Colombia-Switzerland BIT, which asserts that the preclusive effect of the fork-in-the-road provision is triggered only in the event of full and complete overlapping of claims both subjectively and objectively.

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<sup>367</sup> Respondent’s Counter Memorial on Jurisdiction ¶ 357.

745. Wrong in this regard is Colombia's statement at paragraph 359 of its Counter Memorial:

Tribunals applying fork in the road provisions (such as Article 11(4) of the Colombia-Switzerland BIT), have assessed whether the fundamental basis of a claim in the international arbitration on the one hand and in the domestic proceedings on the other hand were the same.

746. Respondent primarily refers to three cases in asserting this claim: (i) *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, (ii) *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, and (iii) *Supervision y Control S.A. v. Republic of Costa Rica*.<sup>368</sup> Respondent cites to these cases on an assumption that the dispositive "objective" and "selective" elements are the same as in the present action. That assumption is not accurate. Claimant submits that there is no authority asserting the proposition set out in Respondent's statement at paragraph 357 of its Answer; that statement is simply false.

***a. Pantechniki v. Albania***

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<sup>368</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, RL-0073 (ii) *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, RL-0074 and (iii) *Supervision y Control S.A. v. Republic of Costa Rica* RL-0050.

747. In *Pantechniki v. Albania*, the claimant is a Greek construction company which won an international tender to perform infrastructure work in Albania for the General Road Directorate of Albania.

748. Looters ransacked the claimant's work in Albania as part of a string of violent incidents. As a result, the claimant was forced to repatriate most of its personnel for security reasons.

749. The contracts between the claimant and the General Road Directorate of Albania contained an indemnity provision concerning losses arising from civil disturbance. The claimant applied for compensation under the indemnity provision. The application was rejected and no payment was made.

750. The claimant then filed an action against the Albanian Ministry of Public Works before Albanian courts. Eventually, the Court of Appeal of Tirana ruled that the contractual indemnity provision was null and void under Albanian law because it purported to create a no fault liability.

751. The claimant appealed to the Supreme Court but subsequently abandoned the appeal on the assumption that the Supreme Court was unlikely to rule in its favor and against the Albanian Government. Instead, the claimant

commenced ICSID arbitration proceedings pursuant to the Albania-Greece BIT.

752. In the arbitration proceedings Albania asserted that the claimant had breached the Fork in-the-Road provision set out in Art. 10.2 of the Albania-Greece BIT which reads:

If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal...

753. A distinctive feature of this case was the contractual nature of the claim asserted. It was a simple case to enforce an indemnity provision typical to most infrastructure contracts. By initiating proceedings under the ICSID Convention, the claimant attempted to prosecute its contractual claims, which had not been pursued to the conclusion of all judicial labor before Albanian courts, as investment treaty violations. The ICSID claim was eminently of a contractual nature. There were no corresponding provision under the Albania-Greece BITs or a so-called “umbrella clause” that would allow for the prosecution of such contractual claims as BIT violations.

754. The sole arbitrator summarized the factual framework in clear terms:

63. *The Claimant's Albanian court action clearly had a contractual foundation...* The Court of Appeal of Tirana rejected the claim on the grounds that this contractual provision was a nullity.

64. *This arbitration cannot proceed on a contractual basis for the simple reason that ICSID jurisdiction must be founded on the Treaty. There is no so-called umbrella clause in the Treaty which might leverage the contractual claim.* The Claimant understands this very well and therefore insists that it is here invoking the protection of the Treaty and not that of the Contracts... Yet there comes a time when it is no longer sufficient merely to assert that a claim is founded on the Treaty. *The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract.* Otherwise the Claimant must live with the consequences of having elected to take its grievance to the national courts.

...

67.... The Claimant's grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant *chose to take this matter to the Albanian courts*. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.<sup>369</sup>

(emphasis supplied).

755. The investment arbitration action in *Pantechniki* is too materially distinct from the case before this Tribunal to serve as precedent. In *Pantechniki* the identical claim was asserted in both the domestic judicial proceedings and in the arbitration. The claimant in *Pantechniki* did not even advance a pretense of cloaking with the mantle of a treaty violation a plain and simple contractual indemnity claim.

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<sup>369</sup> RL-0073.

756. The sole Arbitrator clarified that the action should not have fallen within the scope of the BIT in the first place because it was not actionable within the parameters of public international law in the absence of a specific provision to that effect, i.e. an umbrella clause, in the relevant BIT.

*b. H&H v. Egypt*

757. In *H&H*<sup>370</sup> the dispute arose out of a Management and Operation Contract (the “MOC”) entered into by H&H and an Egyptian government-controlled company. A number of disputes arose out of the MOC, which generated arbitral and judicial proceedings. Specifically, the claimant based the ICSID proceeding on the host-State’s alleged refusal to honor an option to purchase hospitality property. The averment asserted that somehow the breach of the MOC, coupled with an eviction, constituted violations of FET, expropriations, and full security and protection.

758. In *H&H’s* Decision on Jurisdiction the tribunal dismissed Egypt’s objections based on *ratione personae*, *ratione materiae*, *ratione temporis*, and transferred to the merits hearing a number of issues, including the question of *the validity of the Option to Buy and Egypt’s objections*

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<sup>370</sup> RL-0074.



*based on the Treaty's fork-in-the-road provision.* The local arbitration in *H&H*, the court and the ICSID arbitration proceedings shared (i) the same facts, (ii) the same subject matters, and (iii) the same causes of action. The tribunal could not help but observe:

360. The Tribunal notes, at the outset, that the basis for the Claimant's Treaty claims and its contractual claims, which are based on the Option to Buy and the MOC *as well as associated correspondence, are fundamentally the same. These claims were settled by the Cairo Arbitral Award, rendered in Cairo on 28 February 1995.*

(emphasis supplied).

759. The tribunal analyzed each and every claim brought under the two different systems and found that the claims in the ICSID arbitration were the same as the claims brought in Egypt before different fora against Grand Hotels of Egypt ("GHE"), an entity owned by the Government of Egypt:

371. In the present arbitration, the Claimant's expropriation claim is based on the alleged interference by GHE with the Claimant's rights under the MOC. The Claimant contends that

the Respondent obstructed the Claimant's ability to perform the MOC, refusing to accept the Claimant's development plans and preventing it from obtaining a permanent operating license, and finally cancelling the MOC. The Claimant's expropriation claim is also based on GHE's denial of the existence of the Option to Buy.

760. With respect to the Cairo arbitration proceedings, the ICSID tribunal underscored that each and every claim asserted in that proceeding were but an iteration of the claims that claimant had advanced in Cairo before different domestic fora:

372. The Tribunal notes that the Cairo Arbitration concerned (i) the Claimant's rights under the MOC; (ii) GHE's alleged breach of the MOC by way of its failure to accept the development plans; (iii) the failure of the Ministry of Tourism to issue a permanent operating license as a result of GHE's alleged interference and instructions to the Ministry; (iv) GHE's alleged right to revoke the MOC and demand delivery of the Hotel and Land from the Claimant; and (v) the Claimant's alleged Option to Buy.

...

374. The Tribunal notes that the Claimant also initiated two proceedings in the South Cairo Court of First Instance on 1 and 4 June 1995 respectively, claiming damages for breach of the MOC based, *inter alia*, on GHE's alleged refusal to accept the Claimant's development plans and interference with the licensing process, and complaining of GHE's failure to honor the alleged Option to Buy...

...

377. It is also important to note that the Claimant's expropriation *claim does not have an autonomous existence outside the contract*. The Claimant's expropriation claim is in reality based on an alleged violation of Articles 2.7, 2.1 and 3.5 of the MOC...

(Emphasis supplied).

761. Finally, the *H&H* tribunal understandably found that it was impossible to consider the claim brought by the claimant as genuine BIT claims:

382. The Tribunal cannot accept claims which are fundamentally based on the very same facts and, contrary to

what the Claimant alleges, *on the very same contract* relied upon by the Claimant in support of the claims submitted before the Cairo Arbitral Tribunal and Egyptian local courts. Accepting the Claimant's argument would deprive Article VII 3(a) of the Treaty of any meaning and effect.

(Emphasis supplied).

762. Respondent has relied on authority that shared a very particular common denominator. The cases all concern contractual claims that were unsuccessfully prosecuted before domestic tribunals in a factual matrix involving the same parties. In addition, after losing or abandoning the prosecution of contractual claims before the domestic fora, the claimants attempted to convert plain breaches of contract averments into treaty claims. It only follows that the fork-in-the-road objection would apply. Respondent fails to establish the relevance of these cases to the proceeding before this Tribunal.

*c. Supervision y Control v. Costa Rica*

763. Respondent also relies on *Supervision y Control S.A. v. Republic of Costa Rica*.<sup>371</sup> There as well Respondent fails to disclose relevant language.

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<sup>371</sup> RL-0050.

764. In that case Costa Rica relied on Art. XI.3 of the Spain-Costa Rica BIT. is different in (i) scope (ii) formulation, and (iii) is altogether distinguishable from Art. 11(4) of the Colombia-Switzerland BIT.

765. The provision reads:

3°-Una vez que el inversor haya remitido la controversia a un tribunal arbitral, esta decisión *será* definitiva. Si el inversor hubiera sometido la controversia al tribunal competente de la Parte Contratante en cuyo territorio se realizó la inversión, éste podrá, asimismo, recurrir a los tribunales de arbitraje mencionados en el presente artículo, siempre y cuando dicho tribunal nacional no hubiera emitido sentencia. En este último caso el inversor *deberá* adoptar las medidas que se requieran a fin de desistir definitivamente de la instancia judicial en curso.<sup>372</sup>

(emphasis supplied).

766. In the *Supervision y Control* proceedings, where Costa Rica was assisted by the same counsel assisting Respondent in this case, the translation of the referenced provision was

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<sup>372</sup> Spain-Costa Rica BIT CL-0323-A.

mistranslated and erroneously stipulated to by the parties as follows:

3. Once an investor has submitted the dispute to an arbitral tribunal, the award shall be final. If the investor has submitted the dispute to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway.<sup>373</sup>

767. The Parties in *Supervision y Control* both mistranslated the critical sentence contained in Art. XI.3 of the Spain-Costa Rica BIT.

768. The very first sentence of Art. XI.3 of the Spain-Costa Rica BIT reads:

3°-Una vez que el inversor haya remitido la controversia a un tribunal arbitral, esta decisión será definitiva.

769. The agreed parties' translation in *Supervision y Control* reads:

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<sup>373</sup> *Supervision* at para. 6 RL-0050.

3. Once an investor has submitted the dispute to an arbitral tribunal, *the award shall be final*.

(emphasis supplied).

770. The proper translation can only read as follows:

Once an investor has submitted the dispute to an arbitral tribunal, that decision [to submit the dispute] shall be final.

771. The “decision” does not refer to an award that “shall be final,” but rather the *act* of submitting to arbitration, which act shall be final.

772. Aside from the clear textual language and the mishap of literally translating “decisión,” as an “arbitral decision” or “award”, the language in Art. XI.6 of the Spain-Costa Rica BIT removes any possible lingering doubt. Article XI.6 of the Spain-Costa Rica BIT reads:

6°- Las decisiones arbitrales serán definitivas y vinculantes para las partes en la controversia. Cada Parte Contratante se compromete a ejecutar las sentencias de acuerdo con su legislación nacional.

773. Art. XI.6 of the Spain-Costa Rica BIT translates in to English as follows:

6. Arbitral decisions shall be definitive and binding on the parties to the dispute. Each Contracting Party shall commit to executing the judgments/awards in keeping with its national legislation.

774. This provision makes clear that awards are final and binding and not the language in Art. XI.3 of the Spain-Costa Rica BIT, as incorrectly translated in *Supervision y Control*.

775. Because of the referenced mistake, however, the Tribunal treated the clause as a forum selection provision.

776. The provision relied upon by Costa Rica in *Supervision y Control*, as mistranslated by the parties and accepted by the tribunal, is not even a fork-in-the-road provision:

294. In order to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions, Investment Treaties use two methods for limiting the selection of a dispute resolution mechanism by the investor. The first method consists of obligating the investor to select a dispute resolution mechanism *ab initio* through an irrevocable option clause, usually called 'fork in the road,' which implies that once one of the



routes is selected, the possibility of choosing the other is excluded. Under the second method, based on the concept of *waiver*, once the investor chooses international arbitration under the corresponding treaty, it must waive the exercise of any claim before another dispute resolution mechanism, including those already initiated and those it could initiate.

...

The Tribunal considers that Article XI.3 of the Treaty constitutes a forum selection clause corresponding to the second method, a waiver clause, for limiting the selection of dispute resolution mechanisms. Once an international arbitration is initiated, the investor is thereby required to waive or withdraw from the actions it has initiated or could initiate before national courts or an arbitral tribunal, in order to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts.

777. The Colombia-Switzerland BIT's Arts. 11.1 and 11.4 when read together establish a tripartite identity test in order for the fork-in-the-road defense to attach. That test is not met in this

case. Moreover, Respondent has not tendered any authority that would suggest otherwise.

778. Respondent does not, because it cannot, demonstrate that the claims alleged, and even the defenses raised before Colombia's domestic administrative tribunals, at all resemble legal constructs identical to those pending before this Tribunal.

#### **V. THE TRIBUNAL HAS JURISDICTION *RATIONE MATERIAE***

779. In its final point, Colombia asserts this tribunal lacks *ratione materiae* over this matter. Colombia's assertion in this regard is inherently inconsistent, however, as Colombia argues that (i) Claimant has no qualifying investment under the TPA; but also (ii) Claimant's investment was not made in conformity with Colombian law, thus somehow depriving this tribunal of jurisdiction. In fact, Claimant without question had an investment in a Colombian financial institution and thus is entitled to protections arising from the TPA. Given Claimant's ownership of such a qualifying investment, Respondent's assertion that the investment was somehow not compliant with Colombian domestic law is not a proper matter to be considered at the jurisdictional phase of this dispute. Moreover, Claimant's investment either comported with Colombian law or sufficiently comported such that Colombian authorities did not

care about any infraction. In any case, Respondent has waived or is estopped from raising compliance with the internal laws it cites in challenging jurisdiction of the tribunal.

**A. Claimant Owned Qualifying Investments Within the Scope and Coverage of TPA Chapter 12**

780. Respondent takes issue with the fact that on several instances in this proceeding Claimant has pointed out that her original investment in the Colombian market at one point took the form of a bundle of rights incorporated in the 2007 Council of State Judgment, which had (partially) corrected the unlawful expropriation that had been perpetrated by the Colombian financial authorities.

781. As a result, Respondent has seized upon Article 10.28 of the TPA, where the definition of “investment” is qualified by a footnote providing that “[t]he term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”<sup>374</sup>

782. As explained below, the referenced footnote has no application here, and Claimant’s investments fall squarely within the protection of Chapter 12 of the TPA.

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<sup>374</sup> TPA Art. 10.28 n. 15.

## **1. Claimant Invested in the Colombian Financial Services Sector**

783. In order to raise this defense, Respondent has ignored hundreds of pages in the Request for Arbitration and the Memorial on Jurisdiction where Claimant has described her investment in GRANAHORRAR, the Colombian bank at issue.

784. From the very beginning of this proceeding Claimant has argued that her investment in Colombia was made in the 1990s in GRANAHORRAR. Respondent has never denied that simple fact.

785. Indeed, Claimant's opening remarks in her Request for Arbitration state that

In the case before this Tribunal the investment of a U.S. citizen in one of the Republic of Colombia's leading financial institutions, Corporación Grancolombiana de Ahorro y Vivienda "GRANAHORRAR" ("GRANAHORRAR" or "the bank"), was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia ("Banco de la República" or "the Central Bank"), Fondo de Garantía de

Instituciones Financieras ("FOGAFIN"), and Superintendency of Banking (Superintendencia Bancaria de Colombia, now known as Superintendencia Financiera).<sup>375</sup>

786. That concept was then developed throughout the Request for Arbitration.

787. Most importantly, Claimant's Memorial on Jurisdiction devotes an entire section (Section IV.D) to a detailed description of Claimant's investment in GRANAHORRAR.

## **2. Claimant Amply Meets the *Ratione Materiae* Stricture as a Matter of Law and Fact**

788. Claimant, as set forth in the Request for Arbitration and elsewhere, owned shares in GRANAHORRAR.

789. Thus, Claimant's investment started with the ownership of equity interests in GRANAHORRAR. Colombia's actions resulted in Claimant's loss and the liquidation of those interests. The Council of State award in November 2007 -- because it could not simply restore Claimant's shares to her -- provided a proxy for those shares in the form of a damages award (albeit one Claimant believes was inadequate). That proxy

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<sup>375</sup> Request for Arbitration, C-0.

was then taken again by the government through illegal judicial over-reaching, culminating in the Constitutional Court's Order of July 25, 2014 in which Colombia finally denied any and all recourse by Claimant to relief from the domestic Colombian courts.

790. In his expert report, which goes un rebutted by Colombia, Claimant's expert witness Jack Coe sets forth his analysis on the reasons how judicial acts of domestic courts can and, in this case, did arise to violations of international investment agreements and treaties, including the TPA. Coe also explains how the original investment in shares of Granahorrar by Claimant is traced through the 2007 Council of State Decision and ultimately dismantled by the Constitutional Court's decree of July 2014:

The parallel between *Saipem* and the current case seem clear. The Council of State's judgment in this case, the product of legitimate proceedings indisputably within that court's jurisdiction, transformed what was left of Claimant's investment into an entitlement to money. That ruling could reasonably have been expected to involve the Constitutional Court only if it somehow raised issues properly within the competence of that body. The *deus ex machina* intervention of that Court, and its

remarkable de novo, first instance, approach finds a strong analogue in the Bangladeshi court's exorbitant review of the ICC award seen in *Saipem*. The judicial activism in each case was not to be expected, and in both cases those State actions nullified the investment in its then-monetized form.<sup>376</sup>

791. The *Mondev* tribunal was faced with a similar issue in connection with a claim under NAFTA. An underlying investment in terms of a right to develop property lapsed prior to the initiation of arbitration. A lawsuit was commenced by the investor, which then wound its way through the local US court system, with an attempt at an appeal to the United States Supreme Court. Respondent asserted that the "investment" had lapsed prior to the effective date of NAFTA, such that Claimant could not be considered an "investor", and that, by that date, all Claimant "had were claims to money associated with an investment that had already failed."<sup>377</sup>

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<sup>376</sup> Expert Opinion of Professor Jack J. Coe, Jr., March 7, 2019, ¶ 85, citing *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009 (Kaufmann-Kohler, Schreuer, Otton).

<sup>377</sup> *Mondev International Ltd v. United States of America*, ICSID Case No. ARB/99/2, Award, 11 October 2002 (Stephen, Crawford, Schwebel)("Mondev (Award)"), ¶ 77, CL-0045.

792. In rejecting respondent's attack, the *Mondev* tribunal considered Respondent's reading of NAFTA's "investor" requirement to be far too narrow and capable of frustrating the purpose of the relevant provisions of NAFTA. The tribunal stated:

Secondly, the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of the investment up to the moment of its "sale or disposition" (Article 1102(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of treatment of an investment as defined



in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment.<sup>378</sup>

793. Similarly, it makes no sense and is inconsistent with the purposes of Chapter 12 of the TPA to interpret the footnote in 10.28 as excluding claims arising out of failed “investments” that continue to be unresolved for purposes of jurisdiction *ratione materiae*.

794. Colombia’s defense also is groundless because, in any event, the restriction under Article 10.28 of the TPA would not apply to the present case.

795. The footnote in Article 10.28 is intended to cover orders and court judgments as investments in their own right, such as where a financial institution acquires at a discount a court judgment rendered in favor of a different party. The mere purchase and sale of such instruments is

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<sup>378</sup> *Id.* at ¶ 91.

qualitatively different from the types of investment covered by the TPA and contemplated by its object and purpose.

796. However, this is not a case in which an investor simply bought a judgment or other assignable order at a discount and then attempted to enforce the award, to which case the footnote to section 10.28 might have applicability. Rather, this is a case in which an original investment was made in the financial services sector. That investment was subject to the illegal, inappropriate and discriminatory actions of various organs of the Colombian government, which resulted in that investment being transformed into a judgment, which itself was subsequently taken from Claimant by wrongful, illegal and discriminatory actions of the Colombian government through its courts in violation of the TPA.

### **3. Colombia Is Prevented From Deriving Any Advantage From Its Own Wrongful Actions**

797. Even in the event that footnote 15 applied to Claimant's investment in the manner argued by Respondent (which is not the case), Respondent should not be allowed to rely on such an application of the provision.

798. It would be wrong and paradoxical if Respondent could rely upon the application of a

restriction in the TPA that Respondent itself caused to become effective through the unlawful expropriation of Claimant's investment in GRANAHORRAR.

799. Colombia wrongfully expropriated an investment in the Colombian financial services sector. The 2017 Council of State judgment addressed the unlawful expropriation and vindicated Claimant's rights. However, the Council of State could not order Colombia to give GRANAHORRAR back. It could only proceed on the basis of a judgment providing for *restitutio in integrum* (i.e., a judgment that would restore, as much as possible, the injured party's rights as if no wrong had been committed).

800. Any attempt by Respondent to rely upon footnote 15, assuming for the sake of argument that it applied to the present case, would be against international law.

801. It is a well-established principle of international law (shared by the vast majority of domestic legal systems) that a wrongful act cannot become a source of advantages, benefits, or other rights for the wrongdoer.

802. This general principle is often summarized by the Latin maxim, *ex injuria jus non oritur*.<sup>379</sup>

803. No State is entitled to rely upon its own wrongful act in order to vindicate what it regards as a right of its own, ensuing therefrom. That is exactly what Colombia has attempted to do here.

804. In any case, this tribunal has jurisdiction *ratione materiae* over the parties' dispute, because Claimant had an investment within the scope and coverage of Chapter 12 of the TPA.

**B. Claimant's Supposed Non-Compliance with Colombia's Local Requirements for Foreign Investments Does Not Deprive the Tribunal of Jurisdiction**

**1. The Tribunal's Jurisdiction *Ratione Materiae* Is Not Dependent Upon Investors' Compliance With Host State Laws and Administrative Regulations**

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<sup>379</sup> Arbitral Tribunal for Dispute over inter-entity boundary in Breko area, *Republika Srpska v The Federation of Bosnia and Herzegovina* (Award 14 February 1997) (1997) 36 ILM 396, CL-0149-B; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7, CL-0172-A.

**a. The TPA Contains No “In Accordance With Law” Requirement to Limit the Tribunal’s Jurisdiction**

805. Although Respondent argues that the tribunal lacks jurisdiction *ratione materiae* based upon Claimant’s supposed failure to comply with application or registration procedures under local law, the instrument that defines the scope of the tribunal’s jurisdiction is the TPA. Because the TPA, unlike a number of bilateral investment treaties, contains no requirement that the Claimant’s investments have been made “in accordance with law”, any issues with respect to the investments’ compliance with Colombian law do not affect the tribunal’s jurisdiction and, at best, would be considered as part of the merits of the case.

806. As the tribunal is well aware, a number of investment treaties include, typically in their definition of what constitutes an “investment”, language providing that the investment have been made in accordance with the law of the host State. Tribunals have often construed such language as imposing a limitation on their jurisdiction. As the tribunal reasoned in *Quiborax v. Bolivia*,<sup>380</sup> “[t]he definition of investment is relevant to determine the scope of the Contracting Parties’ – and thus

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<sup>380</sup> *Quiborax S.A., et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Decision on Jurisdiction) (27 September 2012). RL-0041

[Respondent's] – consent to arbitration under [the] Treaty.”<sup>381</sup>

807. Here, however, the TPA contains no such provision. Nor has Respondent made any contention to the contrary.<sup>382</sup> Article 12.20 defines “investment” by reference to the definition in Article 10.28, with two exceptions not applicable here, and Article 10.28 states that

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. ...

808. This definition is in no way qualified by any reference to compliance with local laws. Therefore, in delineating the elements that provide for this tribunal’s jurisdiction, the TPA does not admit of any jurisdictional exception based upon

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<sup>381</sup> *Id.* ¶ 255. Some treaties include the legality requirement in a scope-of-application provision rather than the definition of “investment”, which may also serve to limit the tribunal’s jurisdiction. *See Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4 (Award) (15 April 2016), ¶ 202. CL-0291-A.

<sup>382</sup> *See* Counter-Memorial on Jurisdiction, ¶ 388 (referencing TPA Article 10.28 as providing the relevant definition).

supposed non-compliance with laws of the host State.

809. Respondent's argument to the contrary is unsupported by (and inconsistent with) any analysis of the TPA pursuant to the VCLT's principles.

810. Not only is this result required by the text of the TPA, which serves as the source of the tribunal's jurisdiction and therefore defines its scope; it also reflects a general consensus among tribunals that, in the absence of such language, there is no jurisdictional requirement that the investment have been made "in accordance with local law." Commentators have confirmed that the contrary view espoused by Respondent is decidedly a minority position:

in the absence of express wording qualifying the scope of the host State's consent[,] some tribunals have concluded that a legality requirement can be found by inference, whether in the ICSID Convention or in an investment treaty. Most tribunals, however, have rejected any reading of the ICSID Convention, at least, that would import a sweeping jurisdictional requirement of lawfulness by implication, but admit that States may *expressly* condition access to treaty protection in this manner. ...

*The prevailing view is that absent express wording in the applicable investment treaty, breach of host State law whether at the inception of an investment or subsequently is not a jurisdictional matter. Rather, it is a matter which may, depending on the circumstances, lead to claims being excluded on grounds of inadmissibility, or present the host State with a possible defence to allegations of treaty breach.*<sup>383</sup>

811. Thus, numerous awards support the conclusion that there is no jurisdictional requirement that an investment be made in accordance with the laws of the host State in the absence of express treaty language to that effect. For example, the tribunal in *Bear Creek Mining v. Peru* found that “under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. Indeed, the above considerations distinguish the [Free Trade Agreement at issue] from the treaties applicable in *Flughafen Zurich*, *Hamester*, *Inceysa*, and *Phoenix Action*, which

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<sup>383</sup> Aloysius Llamzon and Anthony Charles Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, and Other Investor Misconduct”, in Albert Jan Van den Berg (ed.), *LEGITIMACY: MYTHS, REALITIES, CHALLENGES*, ICCA Congress Series, Vol 18, pp. 451, 498-99 (2015) (emphasis added). CL-0336.



expressly required compliance with the host State’s law.”<sup>384</sup>

812. Likewise, in *Stati v. Kazakhstan*,<sup>385</sup> the tribunal rejected an attempt by Respondent to impose a jurisdictional requirement under the Energy Charter Treaty that the investment must have been made in compliance with the host State’s law:

Respondent has also argued that  
Claimants’ investments were either

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<sup>384</sup> *Bear Creek Mining Corp. v. Republic of Perú*, ICSID Case No. ARB/14/21 (Award) (30 November 2017), ¶ 320. CL-155-A. The *Bear Creek* tribunal also relied upon the existence of a “special formalities” provision in the FTA, **similar to Article 10.14 of the instant TPA, which was expressly incorporated into Chapter 12 by Article 12.2(a)**, which permitted a host State to adopt measures prescribing special formalities in connection with the establishment of covered investments, such as the requirement that the investments be legally constituted under the host State’s laws. For the tribunal, this provision “provides further clarity [on the absence of a jurisdictional limitation], because not only does it not mention such a limit, but ... provides that such a limit is considered a *formality* which would have to be expressly included to be effective.” In *Bear Creek*, as in the instant case, there is no evidence that any such formality restricting covered investments was ever adopted. *Id.* ¶ 320. The tribunal further noted that “[f]or the same reasons as discussed above for jurisdiction, an alleged illegality of the investment is not sufficient to deny admissibility...” *Id.* ¶ 335.

<sup>385</sup> *Anatolie Stati, et al. v. Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Award) (19 December 2013). CL-149-A.

illegal from the beginning or became so at a later stage. First, the Tribunal notes that the ECT contains no requirement in this regard. Indeed, if the contracting states had intended there to be such a requirement, they could have written it into the text of the Treaty, as explained in the ICSID case of *Saba Fakes v. Turkey*. This consideration is even more valid in view of the extremely detailed definition of investment and other details regulated in the ECT. At least with regard to jurisdiction, the Tribunal does not see where such a requirement could come from. Whether that aspect is also relevant for the merits of the case, will have to be examined later in this Award.<sup>386</sup>

813. A similar argument was rejected by the tribunal in *Liman Caspian Oil v. Kazakhstan*.<sup>387</sup> In that case, the claimants' investment was alleged (and ultimately found by a local court) to have violated Kazakhstan's joint stock company law, with the result that the investment transaction was voidable. The tribunal

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<sup>386</sup> *Id.* ¶ 812.

<sup>387</sup> *Liman Caspian Oil BV et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Excerpts of Award) (22 June 2010). CL-0179-A.

rejected the respondent's challenge to jurisdiction *ratione materiae* under the Energy Charter Treaty on that ground, because a voidable investment was nevertheless an "investment" under the language of the treaty:

Taking into account the above contentions of the Parties, the Tribunal considers that *the scope of Respondent's consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law* and was therefore voidable. Since the transfer of the Licence [to Claimants] was not invalid, but only voidable, *Claimants' investment does not fall outside the scope of Respondent's consent to jurisdiction*. But even in the case of an investment finally found to be in breach of Kazakh law from the very beginning *it could be argued that an investment had still been made* and consequently that a dispute over such an investment regarding an alleged breach of the ECT would fall within the jurisdiction of this Tribunal. *In such a case, the question of legality might well be relevant to the merits,*

*but it would not have preclusive effect at the level of jurisdiction.*<sup>388</sup>

814. The language chosen by the State parties to the TPA to function as its legally operative provisions should be taken seriously. Colombia certainly knew how to include “in accordance with law” restrictions in its treaties where it wished to do so. Such restrictions are present, for example, in Colombia’s bilateral investment treaties with China,<sup>389</sup> Spain,<sup>390</sup> and the United Kingdom.<sup>391</sup> However, Colombia did not

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<sup>388</sup> *Id.* at ¶ 187 (emphasis added).

<sup>389</sup> China-Colombia Bilateral Investment Treaty (entered into force 2 July 2013), Art. 1.1 (“The term investment means every kind of economic asset that has been invested by investors of a Contracting Party in the territory of the other Contracting Party *in accordance with the law of the latter* including in particular, but not exclusively, the following: ...”) (footnote omitted) (emphasis added).

<sup>390</sup> Colombia-Spain Bilateral Investment Treaty (entered into force 22 September 2007), Art. 1.2 (“Por *inversiones* se denomina todo tipo de activos de carácter económico que hayan sido invertidos por inversionistas de una Parte Contratante en el territorio de la otra Parte Contratante **de acuerdo con la legislación de esta última** incluyendo en particular, aunque no exclusivamente, los siguientes: ...”) (bolded emphasis added).

<sup>391</sup> Colombia-United Kingdom Bilateral Investment Treaty (entered into force 10 October 2014), Art. I.2(a) (“Investment means every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party, *in accordance with the law of the latter*, including in

include such a restriction in the TPA -- perhaps because the U.S. has followed a consistent practice of *not* including such restrictions in its BITs and trade agreement investment protection chapters.

815. The inclusion -- or not -- of an “accordance with law” limitation in an investment protection treaty reflects a policy choice by the contracting State parties. As the tribunal explained in *Desert Line v. Yemen*, when discussing an even narrower scope of investment coverage,

Some States sign BITs without any regard to the *ex ante* identification of investors who may be covered by the treaty in question. This option ensures broader coverage, and may be thought to maximize the stimulation of investment flows between the two countries. Others require that investors wishing to be protected must identify themselves, on the footing that only specifically approved investments will give rise to benefits under the relevant treaty. This is a different approach, but it too has a legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a

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particular, but not exclusively, the following...” (emphasis added).

qualitative control on the types of investments which are indeed to be promoted and protected.<sup>392</sup>

816. Here, the policy choice made by the State parties was not to impose a limitation on covered investments, a choice which provided investors with broader coverage and was more likely to stimulate investment flows between the two countries.

817. Colombia and the U.S. went to considerable efforts to negotiate the TPA in great detail. The very structure and articulation of the TPA are testament to those endeavors. The contracting Parties did not insert any such “conformity” requirement for a reason. Compliance with the technical strictures of domestic law is one of the main sources of concerns for foreign investors. Compliance with unfamiliar rules of domestic law creates an additional level of insecurity and unpredictability that invariably affects, negatively, the decision to invest in a foreign country.

818. The futility and irrelevance of the domestic law provision relied upon by Colombia is demonstrated by the fact that (i) failure to abide by that provision entailed merely the application of a fine and did not result in the illegality of the

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<sup>392</sup> *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17 (Award) (6 February 2008), ¶ 108. CL-0164-D.

investment and (ii) Colombia eventually repealed that provision in 2017.

819. Thus, as nothing in the TPA supports creation of an exception to the tribunal's jurisdiction for supposed failure to comply with local legal requirements, Respondent's objection to jurisdiction *ratione materiae* must be dismissed.

**b. There Is No Principle of Public International Law Limiting The Tribunal's Jurisdiction To Investments In Conformity With Domestic Law Provisions**

820. Respondent is aware that the TPA does not contain any conformity requirement. Therefore, it attempts to further its defense *ratione materiae* through apodictic statements and reference to irrelevant case law. In particular, Respondent makes the assertion that “[i]t is well established investment law that where a treaty requires investments to be in accordance with a host State's law, investments that are not in conformity with such laws are not protected by a treaty.”<sup>393</sup>

821. By “investment law”, Respondent is presumably referring to international law protecting foreign investments.

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<sup>393</sup> Counter-Memorial on Jurisdiction, ¶ 386.

822. International law is composed of custom and treaty. Customary international law is the collection of fundamental principles of law shared by the vast majority of States that, because of their widespread acceptance and long-standing observance, can be validly regarded as binding fundamental principles of public international law.

823. Those fundamental principles go to the core of international morals and rights. They predominantly protect human rights and genuine principles of law such as *pacta sunt servanda*, *bona fide* and its ramifications, the unlawfulness of bribery and corruption and so on. Those fundamental principles are sometimes also referred to as international public policy.

824. Domestic law provisions requiring registration of foreign investment, unsurprisingly, do not make that very limited list of principles. As a result, any conformity requirement affecting the protection of foreign investments under international law must be the express product of treaty.

825. Unsurprisingly, therefore, the cases relied upon by Respondent to advance its *ratione materiae* defense confirm that conformity with domestic law requirements are the product of treaty.

826. In support of its argument that compliance with domestic regulations is a principle



of "investment law", Respondent refers, in a footnote, to a number of cases. Even a brief review of those cases serves to demonstrate that they do not support Respondent's arguments.

827. The first case, *Fraport v. Philippines*,<sup>394</sup> was brought by a German investor under the aegis of the Germany-Philippines BIT. Article 1 of that BIT contained the following definition of investment:

828. For the purpose of this Agreement:

1. the term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights; (b) shares of stocks and debentures of companies or interest in the property of such companies; (c) claims to money utilized for the purpose of creating an economic value or to any performance having an economic value;

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<sup>394</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25 Award, 16 August 2007. RL-0040.

829. Contrary to Respondent's suggestion, the case centered around scope and application of a specific treaty provision rather than a principle of "investment law" or a principle of international law. The Germany-Philippines BIT contained an express provision requiring foreign investments to be accepted in accordance with the respective laws and regulations of the contracting States. No such provision is present in the TPA.

830. The second case relied by Respondent is *Inceysa v. El Salvador*.<sup>395</sup> *Inceysa* concerned the bilateral investment treaty between Spain and El Salvador. Significantly, prior to the entry into force of that BIT, the contracting States had exchanged notes to make sure that, in order to be covered by the BIT, foreign investments must comply with the domestic law of the host-State.

831. The Arbitral Tribunal recorded that exchange as follows:

192. [...] In one of these communications, El Salvador made certain observations to Spain about the draft text of the Agreement. We transcribe below from this letter the following:

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<sup>395</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 Award 2 August 2006. RL-0076.

[...] II.- Add to the end of subparagraph 5 on the designation of "investments," in paragraph 2 of Article 1, the following language: " ... in accordance with the laws in force in each of the Contracting Parties"

193. The above quote clearly indicates that El Salvador had, from the beginning of the negotiations, the intent to limit the protection of the Agreement it was about to sign only to investments made in accordance with its laws. Furthermore, it is clear that, by said communication, El Salvador tried to include this limitation to its consent in the definition of "investment. "

832. As also recorded by the Tribunal in *Inceysa*, Spain responded to El Salvador's request as follows:

194. [...] "Paragraph 2: The purpose of Article 1 is to define the concepts that will appear in the other articles of the Agreement, which will establish the conditions and treatment to be given to Investments. We consider that the reference to the requirement that Investments must be made according to the internal legislation of each of the Contracting Parties is more closely

related to the process of admission of the Investment. Hence, Article II, titled "Promotion and Admission," has a section expressly indicating that each Contracting Party will admit Investments according to its legal provisions. Thus, it is a necessary condition for an investment to benefit."

833. That understanding was reflected under Article 2 of the Spain-El Salvador BIT where it was agreed that:

Promoción y admisión

1. Cada Parte Contratante promoverá la realización de inversiones en su territorio por inversores de la otra Parte Contratante y admitirá estas inversiones conforme a sus disposiciones legales.

834. The Arbitral Tribunal found that Inceysa had committed serious violations of mandatory provisions of law. The Tribunal summarized those breaches as follows:

236. [...] (i) Inceysa's presentation of false financial information as part of the tender made by it to participate in the bid; (ii) false representations during the bidding process, in

connection with the experience and capacity necessary to comply with the terms of the Contract, particularly concerning its alleged strategic partner; (iii) falsity of the documents by which Inceysa sought to prove the professionalism of Mr. Antonio Felipe Martinez Lavado, on whose career in large measure it based its alleged aptness to perform the functions entrusted to it when winning the bid; and (iv) the fact that it had hidden the existing relationship between Inceysa and ICASUR, in clear violation of one of the fundamental pillars of the bidding rules.

835. The Tribunal considered that the above-mentioned transgressions committed by Inceysa represented violations of the fundamental rules of the bid that made it possible for Inceysa to make the investment that generated the present dispute. The Tribunal concluded as follows:

239. By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law [...].

836. In summary, in *Inceysa* the Tribunal applied an express requirement of compliance with local law under the Spain-El Salvador BIT.

Furthermore, as pointed out by the Tribunal in that case, the investor had committed serious breaches by submitting false statements and documents.

837. A similar situation occurred in *Salini v. Morocco*.<sup>396</sup> In that case the BIT entered into by Italy and Morocco specified the need for investments to comply with the laws and regulations of the host State. The tribunal's Decision on Jurisdiction expressly references Article 1 of the Italy-Morocco BIT, which provides (in English translation) as follows:

Pursuant to the present Agreement,

I. the term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term "investment" includes:

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<sup>396</sup> *Salini Costruttori S.p.A. v. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 Decision on Jurisdiction, 31 July 2001. RL-0083.

- a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;
- b) shares, securities and bonds or other rights or interests and securities of the State or public entities;
- c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;
- d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;
- e) any right of an economic nature conferred by law, or by contract, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;
- f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;
- g) the elements mentioned in (c), (d) and (e) above must be the object of

contracts approved by the competent authority...

838. Not only did the Italy-Morocco BIT expressly indicate that investments should be made in accordance with the domestic law of the host State but, with respect to certain categories of investments, the BIT also required express approval by the competent authorities.

839. In *Salini*, the claimants' investments fell under categories c) and e) of the definition of investment. As such, pursuant to the provisions of the above-mentioned treaty provision, the investments had to be "approved by the competent authority". No such express approval had taken place. However, the Tribunal found that approval could be inferred. The Tribunal observed:

48. The Tribunal considers that the contract in question was indeed the object of an authorisation from the competent authority for the following reasons:

The allocation of the contract to the Italian companies occurred in accordance with the rules and procedure fixed by the President of ADM, acting in virtue of the powers conferred on him by the Board of Directors of this company. As previously mentioned, no infringement



of the laws and regulations of the Kingdom of Morocco has been alleged with regard to this phase. The Tribunal points out, without having to determine if ADM was or was not a mere entity of the Moroccan State, that in its capacity of licensor, the Ministry of Infrastructure approved the conclusion of public procurement contracts by ADM in accordance with the mandatory procedure, which was not alleged to have been violated.

The different stages leading to the signature of the construction contract involved various interventions by the authorities concerned. Thus, the invitation to tender was put out by the Minister of Infrastructure and Professional & Executive Training, President of ADM; the presentation of the bid was made to ADM's Chief Executive Officer; the evaluation and awarding of this bid were carried out by a commission chaired by ADM's Chief Executive Officer and composed of various public organs; and lastly, it was ADM's Chief Executive Officer, as Owner, who signed the construction contract for the project at issue.

840. The Arbitral Tribunal's finding in *Salini* is important for several reasons. First, it

confirms that a conformity requirement (i) must be agreed by the contracting States and (ii) must be expressly stated in the relevant BIT. Secondly, it suggests that the host State cannot rely on mere formalities where other circumstances show that the host State was either aware of the investment or had otherwise accepted the investment.

841. None of these authorities, then, supports some general principle of “investment law” or of international law protecting foreign investments that would impose a local-law conformity restriction on the tribunal’s jurisdiction in the absence of express treaty language or an express agreement between the contracting States.

842. Nor is there any basis for using international law principles to “interpret” into a treaty a jurisdictional requirement that was not specifically agreed by the contracting State. As Professor Zachary Douglas has explained,

The interpretation of investment treaties against the background of general international law would not, in itself, be incorrect. ...

However, given that all investment treaties expressly regulate the existence and scope of the international tribunal’s jurisdiction, the recourse to general principles must fit within the interpretative

space that is captured by the terms of the relevant treaty provisions. Such recourse, in other words, must be consistent with the principles of treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

According to Article 31(1) a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose'. This does not give a tribunal a licence to refashion an express provision of the treaty so that it better serves the principle of good faith in the estimation of the tribunal. As highlighted by Gardiner, 'the term "in good faith" indicates how the task of interpretation is to be undertaken ... [G]ood faith does not have an entirely independent function'.

...

General principles of international law can certainly enlighten a choice between competing interpretations of a treaty provision, but they cannot provide an independent basis for limiting the jurisdiction of an international tribunal through the

interpretation of the express treaty provisions that establish that jurisdiction. Principles of international law such as good faith and *nemo auditur propiam turpitudinem allegans* are not principles whose significance in relation to the jurisdiction of an international tribunal is so notorious that they require no express recognition in the treaty text.<sup>397</sup>

**c. Respondent's Position That A Conformity Requirement Applies Even In the Absence of Express Treaty Language Is Unfounded**

843. Respondent relies upon several cases for the express proposition that a conformity requirement applies irrespective of whether it is actually included in the relevant international treaty.<sup>398</sup> None of these cases supports Respondent's *ratione materiae* objection, either.

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<sup>397</sup> Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID Review No. 1 at 155, 169-70 (2014). CL-0357.

<sup>398</sup> Counter-Memorial on Jurisdiction, ¶ 386 n. 775.

844. In *Hamester v. Ghana*,<sup>399</sup> one of the main jurisdictional objections rested upon serious allegations that from the very outset the investment had been planned through fraud and breaches of fiduciary duties and, therefore, was in breach of Ghanaian law. The Tribunal described the defense as follows:

96. As just stated, the Respondent objects to this Tribunal's jurisdiction on the basis that there was no "investment" in this case in accordance with Ghanaian law, for the purposes of Article 10 of the BIT, because the investment was tainted with substantial fraud, both in its initiation and in its performance throughout the years.

845. Article 10 of the Germany-Ghana BIT contained an *express requirement for compliance* with the host State's legislation. It stated that the Treaty should also apply to investments made prior to the Treaty's entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.

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<sup>399</sup> *Gustav FW Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 Award, 18 June 2010. RL-0036.

846. Prior to addressing the allegations of illegality of the investment raised by Ghana, the *Hamester* tribunal clarified the scope and reach of the provision addressing compliance with domestic law.

127. The Tribunal considers that a distinction has to be drawn between (1) legality as at the *initiation* of the investment (“made”) and (2) legality *during the performance* of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal’s jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal’s jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT.

847. The tribunal’s finding shows that there is no general requirement of conformity and that, where contracting States negotiate one such provision, that provision must be enforced within the prescribed limits agreed by the contracting States. Thus, even when the contracting States

have agreed to insert a conformity clause into the treaty's text, that provision does not have general application.<sup>400</sup>

848. Respondent also bases its argument for an implied jurisdictional requirement of compliance with host-State law on the following passage from the award in *Phoenix Action v. Czech Republic*:<sup>401</sup>

In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their

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<sup>400</sup> Moreover, the *Hamester* tribunal considered that a "conformity" rule, if applicable, should be flexibly applied:

138. Hamester's practices might not be in line with what could be called "*T ethique des affaires*," but, in the Tribunal's view, they did not amount, in the circumstances of the case, to a fraud that would affect the Tribunal's jurisdiction. The Tribunal sees the overstatement of invoices as an issue bearing upon the balance of equities between the two parties, rather than the existence itself of the contract or the investment. Such elements would have been taken into consideration by the Tribunal when discussing the merits, if it had found that any compensation was due to Hamester.

<sup>401</sup> *Phoenix Action Ltd. v Czech Republic*, ICSID Case No. ARB/06/05 Award, 15 April 2009. CL-0061.

laws [I]t is the Tribunal's view that this condition—the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT.

849. Respondent's reference to *Phoenix Action* is noteworthy for three reasons.<sup>402</sup>

850. First, the passage quoted by Respondent is revealingly selective and incomplete. The whole paragraph reads as follows:

101 In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the

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<sup>402</sup> Moreover, *Phoenix Action*, like *Hamester*, has been the subject of criticism for the inadequacy of its reasoning to support the proposition that illegality precludes jurisdiction even in the absence of an express treaty provision. See Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID Review No. 1 at 155, 170-71, 176-77 (2014). CL-0357.



host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. This position of the Tribunal has also been adopted in the case of *Plama*, where the Tribunal was faced with the silence of the relevant treaty on the necessary conformity of a protected investment with the laws of the host country. This did not prevent it to consider that this condition had to be implied:

“Unlike a number of Bilateral Investment Treaties, the ECT [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law ... The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.”

In any event, the Tribunal notes that such requirement is expressly stated in the Israel/ Czech Republic BIT.

851. Secondly, the passage quoted by Respondent is an *obiter dictum*. As the Tribunal indicated in the final sentence of the paragraph, which Respondent studiously omitted: “In any event, the Tribunal notes that such requirement is expressly stated in the Israel/ Czech Republic BIT.”

852. Indeed, Article I of the Czech Republic-Israel BIT provided that:

For the purpose of the present Agreement:

1. The term “investments” shall comprise any kind of assets invested in connection with economic activities by an investor or one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include [...].

(emphasis added).

853. Third, the tribunal seems to make a twofold argument. The tribunal indicated that (a) conformity requirements, where present, must be respected, and (b) international law and domestic law should in any event be taken into account to prevent abusive actions under the ICSID system.

854. Significantly, these two sets of provisions are different. Category (a) involves the domestic law provisions as identified by the parties in a conformity clause under the treaty (which, of course, does not exist in the TPA). In contrast, category (b) involves only the core principles of domestic and international law, rising to the level of public policy or *ordre public* -- not every rule or regulation imposed by the host State. These two different principles are addressed in Parts V.C.1 and V.C.2, respectively, of the award.

855. This reading is confirmed by two passages in the *Phoenix Action* award. The first deals with the very point that ICSID proceedings cannot be read in isolation from general principles of law:

78. It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or

in support of slavery or trafficking of human organs.

856. Here, the tribunal is clear on the fact that only the general principles of law will apply to treaties irrespective of a specific agreement to incorporate them in the contracting States' agreement. The Tribunal mentioned "the most fundamental rules of protection of human rights". It did not mention laws or regulations of domestic law. That passage must be taken into account to understand fully the tribunal's suggestion, in *obiter dicta*, that certain norms of international law and domestic law would apply to the definition of protected investments irrespective of any reference to that effect in the governing treaty.

857. This point is corroborated by the second passage of the *Phoenix Action* award, where the Tribunal identifies the concerns justifying the application of certain provisions of international law and domestic law in addition to those expressly incorporated by agreement of the contracting States:

113. In the instant case, no question of violation of a national principle of good faith or of international public policy related with corruption or deceitful conduct is at stake. The Tribunal is concerned here with the international principle of good faith as applied to the international arbitration

mechanism of ICSID. The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected.

(emphasis added).

858. The Tribunal's mission was clear and so were the actual scope and reach of its findings. According to the Tribunal, at stake was ensuring that protection only is offered to investments that are made in compliance with the international principle of good faith.

859. Respondent also relies upon *Plama v. Bulgaria*<sup>403</sup> to support its argument for a tacit jurisdictional requirement of compliance with host State law. In that case the issue was whether concerted misrepresentations with respect to the actual beneficiaries of the investment amounted to a breach of international law and Bulgarian law.

860. In *Plama*, the claimant had brought proceedings for the alleged breach of the Energy

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<sup>403</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 Award, 27 August 2008. RL-0037.

Charter Treaty. The tribunal found that the claimant had committed a fraud:

135. The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the "straw-man" provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.

861. The decisive factor for the tribunal to rule that the investment was illegal and therefore outside the scope of the ECT, was the evidence that the investor's fraud was contrary to general principles of international law and Bulgarian law even though the focus was on international law. The Tribunal observed:

138. Unlike a number of Bilateral Investment Treaties, the ECT does not

contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman's statement at the adoption session of the ECT on 17 December 1994:

[ ... ] the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. [ ... ] The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.

139. In accordance with the introductory note to the ECT "*[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [ ... ]*". Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect

for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.

140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also "applicable rules and principles of international law", in conformity with Article 26(6) of the ECT which states that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law". In order to identify these applicable rules and principles, the Arbitral Tribunal finds helpful guidance in the decisions made in other investment arbitrations cited by Respondent.

862. It is clear from the Tribunal's reasoning that in addition to the general principles of international law, the illegality of an investment might be determined by a breach of fundamental principles of domestic law and not by a breach of any provision of domestic law.

863. This is confirmed by the fact that the Tribunal in *Plama* corroborated its findings with



reference to the case of *Inceysa* and *World Duty Free of Kenya*<sup>404</sup> explaining that in both cases the respective Tribunals had found a breach of fundamental principles of law.

864. With respect to *Inceysa*, the tribunal explained:

141. In *Inceysa v. El Salvador*, a case in which the investor procured a concession contract for vehicle inspection services in El Salvador through fraud in the public bidding process, the tribunal found that the investment violated the following general principles of law: (i) the principle of good faith defined as the "absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment" and (ii) the principle of *nemo auditur pro priam turpitudinem allegans* - that nobody can benefit from his own wrong - understood as the prohibition for an investor to "benefit from an investment effectuated by means of one or several illegal acts". In addition, the tribunal found that recognizing the existence of

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<sup>404</sup> *World Duty Free Company Limited v. The Republic of Kenya*, Award of 4 October 2006, ICSID Case No. Arb. 00/7, CL-0294-A.

rights arising from illegal acts would violate the "respect for the law" which is a principle of international public policy.

865. In connection with *World Duty Free of Kenya*, the tribunal noted:

142 The notion of international public policy was also invoked by an award in the case of *World Duty Free v. Kenya*. In this case, the investor had obtained a contract by paying a bribe to the Kenyan President. According to the tribunal, the term "international public policy" was interpreted to signify "*an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora*". Accordingly, the tribunal found that "*claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal*". The tribunal further concluded that "*as regards public policy both under English and Kenyan law [...] the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of ex turpi causa non oritur action*". As explained in the award, the *ex turpi causa* defence "rests on a principle of public policy that the

courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct”.

(emphasis in original).

866. Significantly, the decision in *Plama* was not a conclusion declining to find jurisdiction *ratione materiae* but rather a decision on the merits finding that the claimant was not entitled to the protections of the treaty.<sup>405</sup> This has been succinctly analyzed by Prof. Zachary Douglas:

The Tribunal in *Plama Consortium v Republic of Bulgaria* mapped out [in its Decision on Jurisdiction of 8 February 2005] the logical consequences of the manner in which an arbitration agreement comes into existence for investment treaty arbitration while considering a plea of illegality. The illegality asserted by the Respondent was that the approval of Bulgaria’s privatization authorities—which was a condition precedent for the acquisition of the investment (shares in an oil refinery company)—had been obtained by

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<sup>405</sup> *Plama* (Award) ¶ 139 (concluding that “the substantive protections of the ECT cannot apply to investments that are made contrary to law.”) RL-0037.

fraudulent misrepresentation. The Tribunal held:

[T]he Respondent's charges of misrepresentation are not directed specifically at the parties' agreement to arbitrate found in Article 26 [of the Energy Charter Treaty (ECT)]. The alleged misrepresentation relates to the transaction involving the sale of the shares of Nova Plama by EEH to PCL and the approval thereof given by Bulgaria in the Privatization Agreement and elsewhere. It is not in these documents that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama transaction; so even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of

misrepresentation by the Claimant, the agreement to arbitrate remains effective. [¶ 130.]

The Tribunal thus resolved to hear the allegation of fraudulent misrepresentation on the merits. After a full hearing of all the evidence, the Tribunal was able to conclude that the Respondent's case of fraudulent misrepresentation had been proven. The consequence was not, of course, the retroactive vitiation of the Tribunal's jurisdiction but the dismissal of the Claimant's claims on the basis that its unlawful investment would not be protected by the substantive obligations of the Energy Charter Treaty.<sup>406</sup>

867. Finally, Respondent also relies, in a footnote, on the award of *SAUR v. Argentina*.<sup>407</sup> *SAUR* was a case where the arbitral tribunal found that there was no express requirement of compliance with domestic law.

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<sup>406</sup> Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID Review No. 1 at 155, 161-62 (2014)., CL-0357.

<sup>407</sup> *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 Decision on Jurisdiction and Liability, 6 June 2012, CL-0233-A.

868. The SAUR tribunal's findings are in line with Claimant's suggested reading of the cases cited by Respondent. The tribunal stated that, in order to affect an investor's ability to rely on the protection of a BIT, there must have been a serious breach of the judicial system. The relevant passage in the French version of the award reads as follows:

308. Cependant, le Tribunal coïncide également en partie avec l'argumentation avancée par la République argentine. Il entend que la finalité du système d'arbitrage d'investissement consiste à protéger uniquement les investissements licites et bona fide. Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent. La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, car en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agit à l'encontre du droit.

(emphasis added).<sup>408</sup>

869. In that case Argentina claimed that the claimant had committed serious abuses of law. According to Argentina, the claimant had put in place a secret mechanism that allowed the illegal appropriation of funds for millions of U.S. dollars. Significantly, however, Argentina failed to establish a serious breach of fundamental principles of law, and therefore its defense was rejected by the tribunal.

870. Accordingly, none of the cases cited by Respondent supports its position that there is a

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<sup>408</sup> The Spanish-language version reads as follows:

308. Sin embargo, el Tribunal también coincide en parte con la argumentación esgrimida por la República Argentina. El Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica en proteger únicamente inversiones legales y bona fide. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante. El requisito de no haber incurrido en una violación grave del ordenamiento jurídico es una condición tácita, ínsita en todo APRI, pues no se puede entender en ningún caso que un Estado esté ofreciendo el beneficio de la protección mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.

general, tacit, jurisdictional requirement that investments must fully comply with the host State's laws. In the two cases where no express treaty provision required such compliance (and in the obiter dicta in the two other cases), the tribunals considered whether there were breaches of *fundamental* legal principles, and not merely a failure to comply with local laws generally.

**d. Any Jurisdictional Restriction Based On Compliance With Non-Treaty Law Would Not Extend To Colombia's Administrative Requirements**

871. It bears noting that the vast majority of the arbitral decisions cited by Respondent for the proposition that investments must be made in accordance with host State law in order for jurisdiction *ratione materiae* to exist are premised upon the existence in the relevant treaties of an *express provision* requiring such compliance.<sup>409</sup> Of

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<sup>409</sup> See, e.g., *Fraport*, RL-0040; *Inceysa*, RL-0076 (express agreement by contracting States during negotiations); *Salini*, RL-0083; *Hamester*, RL-0036; and *Phoenix Action*, CL-0053, all cited in Counter-Memorial on Jurisdiction ¶¶ 471-74 & nn. 1012-17 and discussed above. Other cases cited by Respondent that interpreted express compliance requirements contained in the relevant treaties include *L.E.S.I. v. Algeria*, ¶ 80, RL-0077; *Anderson v. Costa Rica*, ¶ 46, RL-0043; *Kim v. Uzbekistan*, ¶ 365, RL-0039; *Quiborax v. Bolivia*, ¶ 255, RL-0041; *Metal-Tech v. Uzbekistan*, ¶ 130, RL-0042; and *Saba Fakes v. Turkey*, ¶ 115, RL-0078.



the cases cited for the proposition that a general requirement of compliance exists and is distinct from any express treaty provision, all but two of them involved treaties that in fact contained such an express provision.<sup>410</sup>

**i. Respondent Has Not Alleged Any Grave Violations Of Fundamental Legal Principles**

872. Tribunals and commentators have recognized that, where the question of an investor's compliance with host-State law is *not* directly tied to an express compliance provision in the treaty, the better approach is to treat the question, not as a jurisdictional issue, but rather as one to be considered in connection with the merits.<sup>411</sup>

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Many of these decisions are irrelevant to this case for additional reasons. One example is the *Saba Fakes* award. Although the tribunal, in considering the “in accordance with the laws and regulations in force” provision of Article 2(2) of the Netherlands-Turkey BIT, opined as to the scope of that provision, it found that there was no need to consider the respondent's jurisdictional challenge with respect to that language because the claimant had otherwise failed to show an investment. *Id.* ¶¶ 119-20, 147-48.

<sup>410</sup> As noted above, *Hamester* and *Phoenix Action* contained express requirements that the investments be made in conformity with host State law.

<sup>411</sup> *See, e.g., Plama* (Award) ¶ 139 (concluding that “the substantive protections of the ECT cannot apply to

873. Moreover, those tribunals that have imposed a “compliance with law” requirement that is *not* based upon treaty language have focused on whether the investment was made in violation of *fundamental* principles of law. Because their analysis was not a matter of interpreting treaty language but rather one of applying external principles of international law, this test involves a much higher threshold for denying investors protection of the treaty than one that is rooted in the treaty itself.

874. For example, the tribunal in *Rumeli Telekom v. Kazakhstan*<sup>412</sup> found that “investments in the host State will only be excluded from the

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investments that are made contrary to law.” RL-0037; *Hamester*, ¶ 129 (potentially illegality not covered by the treaty’s express language does not affect jurisdiction, but might be relevant at the merits stage), RL-0036; *Anatolie Stati, et al. v. Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Award) (19 December 2013) ¶ 812, CL-0149-A; *Liman Caspian Oil BV et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Excerpts of Award) (22 June 2010) ¶ 187, CL-0179-A; Aloysius Llamzon and Anthony Charles Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, and Other Investor Misconduct”, in Albert Jan Van den Berg (ed.), *LEGITIMACY: MYTHS, REALITIES, CHALLENGES*, ICCA Congress Series, Vol 18, pp. 451, 498-99 (2015) CL-0336; see generally Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID Review No. 1 at 155-86 (2014), CL-0357.

<sup>412</sup> *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Award) (29 July 2008), RL-0072.

protection of the treaty if they have been made in breach of fundamental legal principles of the host country.”<sup>413</sup> *Rumeli* referenced the decision in *L.E.S.I. v. Algeria*,<sup>414</sup> which announced the same rule, even in the presence of express provisions in the Algeria-Italy BIT.<sup>415</sup> Similarly, *SAUR* premised its analysis on the same basic concept -- a tacit condition that the investor not commit a grave violation of the legal order.<sup>416</sup>

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<sup>413</sup> *Rumeli*, ¶ 319. RL-0072.

<sup>414</sup> *L.E.S.I. S.p.A. et al. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3 (Award/“Décision”) (12 July 2006). RL-0077.

<sup>415</sup> *L.E.S.I.*, ¶¶ 80, 83(iii), 85 (“parce que la mention que fait le texte à la conformité aux lois et règlements en vigueur ne constitue pas une reconnaissance formelle de la notion d’investissement telle que la comprend le droit algérien de manière restrictive, mais, selon une formule classique et parfaitement justifiée, *l’exclusion de la protection pour tous les investissements qui auraient été effectués en violation des principes fondamentaux en vigueur.*”) (emphasis added). RL-0077.

<sup>416</sup> *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308 (referencing “[el] requisito de no haber incurrido en una violación grave del ordenamiento jurídico”). CL-0233-A Other tribunals have referenced fundamental principles of good faith, *nemo auditur propiam turpitudinem allegans*, and international public policy, but all in the context of core legal principles rather than with respect to violations of law generally. See, e.g., *Inceysa*, ¶¶ 236-57 (invoking all three in context of investor’s fraud and misrepresentation), RL-0076; *Plama*, ¶ 140-42 (referencing

Tribunals have also applied this “fundamental principles” test even when applying express BIT provisions requiring compliance with host State law -- which provisions do not exist in the TPA at issue here. The tribunal in *Hochtief v. Argentina*<sup>417</sup> noted that

in previous cases, tribunals have focused upon compliance with “fundamental principles of the host State’s law”. This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State’s regulations associated with an investment will operate so as to deprive that investment of the

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principles of international law in context of investor fraud and citing public policy rulings in *Inceysa and World Duty Free Kenya*, RL-0037.

<sup>417</sup> *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Award) (21 December 2016). RL-0056.

protection of a Treaty that contains such a provision.<sup>418</sup>

875. Consequently, the tribunal declined to uphold a jurisdictional/admissibility objection based upon the investor's failure to comply with Argentine loan-registration regulations:

Having considered the facts in the present case, and the submissions of the Parties on this point, the Tribunal does not consider that there is a sufficient basis for rejecting the claims concerning the loans on the basis of their non-registration under Argentine regulations. This decision concerning the effect of the alleged breaches of reporting requirements in Argentina's financial regulations on the question of the admissibility of the claims is, however, taken without prejudice to the possibility that such breaches might, by virtue of Article 2(2) of the Treaty, limit the substantive rights enjoyed by the Claimant.<sup>419</sup>

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<sup>418</sup> *Hochtief*, ¶ 199, RL-0056.

<sup>419</sup> *Id.* ¶ 200, RL-0056. Similarly the tribunal in *Desert Line v. Yemen*, construing a similar express provision in the Oman-Yemen BIT, acknowledged that

In State practice in the BIT area, the phrase "according to its laws and regulations" is quite familiar. Moreover, it has been

876. In this case, there can be no serious contention that Claimant has violated *fundamental* principles of law in making her investment. Cases involving these fundamental principles have addressed investor violations such as fraud, corruption, or bribery.<sup>420</sup> The alleged regulatory violations in this case simply do not rise to such a level.

877. To the contrary, the various host-State provisions cited by Respondent as applying over time appear to have been primarily focused upon foreign-currency controls and exchange transactions.<sup>421</sup> The conduct alleged by Colombia is

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well traversed by arbitral precedents, notably *Inceysa (Inceysa v. Republic of EI Salvador, ICSID Case No. ARB/03/26, 2 August 2006)* and *Fraport (Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/2S, 16 August 2007)* which make clear that such references are intended to ensure the legality of the investment by ***excluding investments made in breach of fundamental principles of the host State's law***, e.g. by fraudulent misrepresentations or the dissimulation of true ownership.

*Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17 (Award) (6 February 2008), ¶ 104 (emphasis added). CL-0164-D.*

<sup>420</sup>See, e.g., *Inceysa v. El Salvador*, ¶236, RL-0076; *Hamester v. Ghana*, ¶ 96, RL-0036; *Plama v. Bulgaria*, ¶ 135, RL-0037.

<sup>421</sup>For example, Decree No. 444 (1967) applied in case foreign capital was used to make the investments, and one of the key items to be provided to the planning department was “when the investor expected to start transferring the profits abroad.”

a failure to apply for regulatory approval and a failure to register investments. Nothing more sinister is alleged -- not even that foreign exchange transactions were actually conducted without the proper approvals. As is discussed in the following section, a failure to register the foreign investment could have been considered an “exchange infraction” under Colombian law, with limited legal consequences. Claimant would be temporarily precluded from sending profits abroad and potentially subject to a fine. Particularly in this context, Claimant respectfully submits that any such regulatory non-compliance could not amount to *grave* violations of *fundamental* legal principles sufficient to bar her from invoking the TPA’s protections.

878. Accordingly, given that the TPA does not contain an “accordance with law” or “compliance” provision, there is no basis for

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The required registration with the *Exchange Office* of the Central Bank would grant the investor the right to transfer profits abroad. Counter-Memorial on Jurisdiction ¶¶ 397-400. Similarly, registration pursuant to Resolution No. 49 (1991) -- which was not required before the investment was actually made -- would entitle the investor “to transfer abroad any profit from the investment and reimburse the invested capital and capital gains.” Counter-Memorial on Jurisdiction ¶¶ 405-07. And Regulation No. 57 (1991), issued by the Monetary Board of the Central Bank, “which regulates exchange transactions”, continued to provide for such registration. Counter-Memorial on Jurisdiction ¶ 408 & n. 808 (also citing External Resolution No. 21).

rejecting jurisdiction on the ground of Claimant’s supposed non-compliance with the various legal provisions invoked by Respondents.

**ii. Even if the TPA Had Contained an “Accordance With Law” Provision, Claimant’s Alleged Regulatory Noncompliance Would Be Insufficient to Defeat the Tribunal’s Jurisdiction**

879. Even in cases where a tribunal is applying an express “compliance” requirement in the treaty (which does not exist in the present matter) rather than applying broader, atextual principles of international law, tribunals typically do not consider minor violations of host State law sufficient to exclude an investment from the treaty’s protection.<sup>422</sup>

880. Rather, in interpreting such an express provision, the appropriate approach is to

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<sup>422</sup> See, e.g., *Quiborax S.A. et al. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Decision on Jurisdiction) (27 September 2012), ¶ 266, RL-0041; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Award) (4 October 2013), ¶ 165, RL-0042; cf. *Vladislav Kim, et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6 (Decision on Jurisdiction) (8 March 2017), ¶ 381 (noting lack of controversy on this point). RL-0039.



apply a proportionality analysis. The *Kim v. Uzbekistan*<sup>423</sup> tribunal explained,

The dominant tendency within these awards [construing BIT legality requirements] is (1) to state that the substantive scope of the legality requirement is limited to violations of fundamental laws of the Host State and (2) to state a variety of rule-like statements whereby the first proposition may be applied.

The Tribunal does not find the analysis thus far satisfactory. ...

...

The lack of support for substantive limits in the ordinary meaning of the terms used is striking inasmuch the Tribunal is not aware of any authority that argues that the legality requirement has no limits. On the contrary, many, if not all, other tribunals exclude minor or trivial acts not in compliance with legislation as not the type of acts intended to be captured by a legality requirement.

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<sup>423</sup> Vladislav *Kim, et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6 (Decision on Jurisdiction) (8 March 2017), RL-0039.

Further, the Parties do not dispute that the legality requirement does not include minor or trivial acts of noncompliance.

The limitations on the substantive scope of the terms in Article 12 become apparent when the ordinary meaning of the terms is considered in their context and in light of the object and purpose of the treaty.

As to context, Article 12 of the BIT is entitled “Application of the Agreement”. This is significant in that the consequence of finding a failure to satisfy the legality requirement is that the BIT does not apply to the investment in question. The legality requirement does not only remove access to arbitration but removes the obligations of the Host State *vis-à-vis* the investor and the investment in total. This, on any view, is a very significant – and harsh – consequence.

Context also includes the preamble ...

It is the combination of desiring to “promote greater economic cooperation” and the fact that an act not in compliance with legislation under Article 12 excludes an investment

from the scope of application of the BIT generally, that indicates the necessary substantive limits on the legality requirement. Given the aim of encouraging investment through the provision of some measure of security, it is not plausible that the drafters of the BIT intended to include minor acts of noncompliance as a basis for denying jurisdiction.

...

In the Tribunal's view, a more principled approach is to be guided in the interpretive task by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by *noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State.*

Several tribunals have referred to proportionality as a principle informing its decision to limit the substantive scope of the legality requirement. In its Decision on Jurisdiction in *Metalpar v. Argentina*, for example, the tribunal wrote:

As explained above, the Organic Law of the General Inspectorate of Justice concerning the Law of Commercial Societies, indicated that sanctions may be imposed for violations of the law, statutes or regulations, which would include lack of registration of a foreign company in the Public Registry of Commerce. These sanctions are, in sum, a notice of warning and fines imposed on the company and its directors.

In the Tribunal's view, the lack of adequate registration could be sanctioned by refusing to register certain documents of the company, through a notice of warning, or by imposition of a fine on the company or its directors, but it would be disproportionate to punish this omission to register by denying the investor an essential protection such as access to ICSID tribunals.

The phrase “*noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State*” is chosen so as to focus more sharply the substantive scope of the legality requirement not on whether the law is fundamental but rather on the significance of the violation. The Tribunal believes that the gravity of the law itself is a central part of the examination but not the sole focal point. ...

...

[T]he Tribunal must evaluate whether the combination of the investor’s conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined. The primary indication of such a compromised significant interest is whether the legal consequence of the violation under the Host State’s law manifests a gravity to the act of noncompliance that is proportional to the harshness

of denying access to the protections of the BIT.<sup>424</sup>

881. After considering various claims of illegality made by the Respondent, the *Kim* tribunal found “that Respondent either has failed to establish that Claimants acted in noncompliance with various laws or that such acts of noncompliance do not result in a compromise of an interest that justifies, as a proportionate response, the harshness of denying application of the BIT.”<sup>425</sup>

882. There is no need for such a proportionality analysis here, because, as has been noted, there is no “compliance with law” requirement to be found within the TPA. However, even under such an analysis, it is clear that the supposed violations of Colombia’s registration and other regulations did not compromise Colombia’s interests (if at all) “to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence.”<sup>426</sup>

883. Here, Claimant is not alleged to have intentionally flouted the regulations nor to have caused any harm to the State’s interests. The

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<sup>424</sup> *Kim*, ¶¶ 384-85, 390-94, 396-98, 408 (emphasis in original) (footnotes omitted), RL-0039.

<sup>425</sup> *Id.* ¶ 541.

<sup>426</sup> *Kim*, ¶ 408. RL-0039.

penalties fixed by Colombia for non-compliance with the relevant regulations were an (at least temporary) inability to export profits and a potential fine. In contrast, the complete loss of the investment's protection under the TPA (including both its substantive and procedural protections) is grossly disproportionate to either Claimant's culpability or the harm to Respondent's significant interests. This becomes all the more apparent in light of Colombia's 2017 elimination of the registration requirements altogether.

884. Thus, as in *Hochtief* and in *Metalpar*, Claimant's alleged non-compliance with the foreign investment regulations is not a sufficient ground for declining jurisdiction *ratione materiae* in this matter.<sup>427</sup>

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<sup>427</sup> See also *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (Decision on Jurisdiction) (29 April 2004), ¶¶ 83-86 (notwithstanding treaty provision requiring investment to be made "in accordance with the laws" of the host State, various alleged technical defects in required investment registrations did not defeat jurisdiction, as "to exclude an investment on the basis of such minor errors would be inconsistent with the object and the purpose of the Treaty,"). RL-0055.

**C. IN ANY EVENT, CLAIMANT'S  
INVESTMENT NEVER BEFORE  
TRIGGERED CONCERNS REGARDING  
COMPLIANCE WITH LOCAL LAWS**

885. The ownership of Granahorrar by Claimant and her husband was initiated in 1986 when Claimant and her husband began accumulating interests in the institution.<sup>428</sup> The holdings were made through six separate companies: Asesorias e Inversiones C.G. LTDA; Exultar S.A.; Compto S.A., Inversiones Lieja; Fultiplex Ltda.; and Interventorias y Construcciones Ltda.

886. Respondent asserts Claimant ran afoul of essentially two sequential Colombian legal schemes that regulate “foreign capital investments,” those being Decree No. 444 of 1967 (along with Decrees 1900 and 1265) and Law No. 9 of 1991, and its concomitant Resolutions No. 49 and 57. But Respondent provides no authority for the assumed proposition that the investments made through Colombian entities would be considered “foreign capital investments” under these regulations.

887. Respondent improperly conflates the concept of a “foreign investor” for purposes of complying with these registration laws, with investors who are entitled to protection under the

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<sup>428</sup> Witness Statement of Astrida Benita Carrizosa, June 7, 2019, ¶¶ 23-24.



TPA. The TPA was signed in 2006, coming into force in 2012. Simply claiming that protection under the TPA does not necessarily equate to Claimant having made a “foreign capital investment” as defined by the registration laws relied upon by Respondent to claim “illegality” in the investments. The analysis of the scope and coverage of the Colombian registration regulatory regime and the TPA must be done separately.

888. Indeed, it is evident that Colombia saw no need for Claimant to register her investment in Granahorrar with the Central Bank. By December, 1997, Granahorrar was ranked among the largest financial institutions in Colombia. Claimant’s son Alberto Carrizosa Gelzis served as a Director of Granahorrar from 1992 to 1998. On July 1, 1998, he was promoted to Chairman of the Board of Directors of the financial institution. As a result of this high profile position, his duties as Chairman included, among other things, dealing with relations with government agencies that regulated Granahorrar, including the Central Bank. As such, Colombia very well knew of the Carrizosa family’s role with Granahorrar. Yet the Colombian government never took action against the Claimant regarding her investment. That is either because there existed no violation of the registration requirements or because no one in the government in Colombia cared enough to raise the issue. It is either wrong or disingenuous for

Colombia to now raise this issue for the first time in this dispute.

889. Respondent now seeks to completely deny Claimant the opportunity to present her case for protection under the TPA to this Tribunal based upon the alleged non-compliance with the registration requirements. Respondent claims this drastic and draconian remedy is supported by precedent, including *Saba Fakes*, *Phoenix* and *Anderson*. All three of these decisions are earlier distinguished under their facts. More importantly, it is significant to understand that under Colombian law, had there been a violation of the approval and registration requirements, the consequences faced by Claimant would have been far less severe than denial of their investments in *Granahorrar* in their entirety.

890. Assuming, *arguendo*, that Claimant was required to register her investment in *Granahorrar* as a “foreign capital investment,” such failure would have been considered an “exchange infraction.” As an infraction, Claimant may not have been able to reinvest or draw upon profits from the investment, or to send abroad in freely convertible currency the net profits generated by the investments. And, arguably, non-compliance may have subjected Claimant to a fine. But late registration would have been allowed with

“exchange rights” reinstated.<sup>429</sup> In other words, a far less severe consequence could have been imposed on Claimant if she were legally obligated to, but failed, to register the investment in Granahorrar as a “foreign capital investment” than the complete loss of her investment as a default consequence requested by Respondent in this proceeding.

891. Finally, as a matter of policy, it bears mentioning that in 2017 Colombia eliminated entirely the registration requirements for “foreign capital investments.”<sup>430</sup> It thus becomes clear that the complete loss of the investment, as Respondent seeks, is grossly disproportional to the domestic policy considerations that may have at one time supported the requirements. To allow a sanction such as a finding of a lack of jurisdiction *ratione materiae* as a result of the alleged non-compliance with Colombian registration requirements would be improper in light of the TPA and its objectives.

**D. COLOMBIA IS ESTOPPED FROM  
RAISING PURPORTED NON-  
COMPLIANCE WITH COLOMBIAN  
LAW**

892. Colombia knew, or should have known, of Claimant’s investment in Granahorrar. Her

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<sup>429</sup> See Article 8 of Decree 4800, ¶ 5; Decree 1746 of 1991, CL-0164-C.

<sup>430</sup> Decree 119, 26 January 2017 1991, CL-0164-A.

family's prominence in the financial regulatory circles would have alerted the authorities to at least investigate if they believed an investment not complying with the internal laws of Colombia had been made in Granahorrar. As this issue never resulted in enforcement action previously, either it was determined that no infraction had occurred or, rather, that no infraction significant enough to merit government intervention had transpired.

893. Colombia first wrongly asserts that it was incumbent on Claimant to have first raised non-estoppel of Colombia in establishing *ratione materiae* of this Tribunal. Nothing in *Kardassopolous*, cited by Respondent for this proposition, supports the assertion. Moreover, such a claim is logically flawed. Among other reasons, it would have been presumptuous for Claimant to foresee that Respondent would rely on its inconsistent laws to claim a defense of a lack of *ratione materiae*.

894. Regardless, Colombia should be deemed estopped to raise its compliance argument regarding internal laws that it never previously believed to apply. Estoppel is one of the “general principles of law recognized by civilized nations.”<sup>431</sup>

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<sup>431</sup> Ian Brownlie, *Principles of Public International Law* 616 (7<sup>th</sup> ed. Oxford Univ. Press 2003) (“A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency.”), CL-0348-A.

International law has long recognized such a requirement on the basis that “a State ought to be consistent in its attitude to a given factual or legal situation.”<sup>432</sup>

895. In the highly regulated banking and financial services sector in which Claimant’s investment was made, particularly in light of the regulators’ deep involvement with Granahorrar and its ownership, as well as the positions held by Claimant’s son, Alberto Carrizosa Gelzis, there is no rational basis to believe that the Colombian government was unaware for years of Claimant’s investment in Granahorrar. To the extent any supposed violations truly existed, Colombia knew, or should have known, of them for years, yet did nothing to enforce the regulations it now attempts to use as a shield in this arbitration.

896. The decisions relied upon by Colombia support Claimant’s estoppel argument. *Fraport* involved a decision in which the tribunal refused to apply the estoppel doctrine given its finding that claimants in that case were involved in a “covert arrangement” about which the Respondent government could not have been aware.<sup>433</sup> And

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<sup>432</sup> I.C. MacGibbon, *Estoppel in International Law*, 7<sup>th</sup> Int’l & Compl L. Q. 468 (1958), CL-0347-A.

<sup>433</sup> *Fraport AG Frankfurt AG Services Worldwide v. The Republic of the Philippines*, ICSID Case. No. ARB/03/25, Award, 16 August 2007 (Fortier, Cremades, Reisman)(“Fraport (Award)”), ¶ 347, RL-0040.

that “arrangement” was found by the *Fraport* tribunal to be both an “egregious” and “intentional” violation of laws of the host state.<sup>434</sup>

897. Of course, the *Fraport* tribunal recognizes the general application of estoppel. “There is, however, the question of estoppel. Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.”<sup>435</sup> Estoppel is appropriate here.

898. Similarly, the respondent in *Kardassopoulos* asserted that agreements entered into by claimant breached the home state’s laws and were void. The tribunal found that the *Kardassopoulos* claimants had every reason to believe the arrangements were in accordance with the law based on the actions of the respondent government and estopped the respondent from objecting to the tribunal’s jurisdiction *ratione materiae*.<sup>436</sup> Here, if nothing else, Colombia’s inaction for years – all the way back to at least

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<sup>434</sup> *Id.* at ¶¶ 397, 401.

<sup>435</sup> *Id.* ¶ 346.

<sup>436</sup> *Ionnis Kardassopolous v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007 (Fortier, Orrego Vicuna, Watts), ¶ 194, RL-0044.

1986 according to Respondent<sup>437</sup> - renders hollow the current claim of a regulatory violation.

899. Moreover, in *Arif*, the tribunal applied the estoppel doctrine to a case where local courts decided that the investment was made in violation of local laws. The *Arif* tribunal determined that a respondent could not rely on its own law, and even a decision of its own courts, to deny the existence of agreements that had been relied upon by both parties, particularly in light of the good faith intention of the parties regarding the investment.<sup>438</sup>

900. In this case, the Colombian government knew or should have known of the ownership interest of Claimant in Granahorrar for years, yet did nothing to enforce its purported regulatory regime in this regard. It should now be estopped from doing so.

## **VI. THE EXPERT OPINION OF DR. JORGE ENRIQUE IBÁÑEZ NAJAR**

901. Dr. Jorge Enrique Ibáñez Najjar has submitted an expert report in this case. In paragraph 3 of the report Dr. Ibáñez Najjar provides that in accordance with “what is

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<sup>437</sup> Colombia’s Counter-Memorial on Jurisdiction, ¶ 410.

<sup>438</sup> *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (Cremades, Hanotiau, Knieper), RL-0045.

established in 5(2)(c) of the IBA Rules (*International Bar Association*) concerning the taking of evidence in international arbitration, I confirm that: (1) I have no employment or professional relationship of any kind with Colombia; (2) I do not have and have not had any employment or professional relationship of any type with Colombia's external lawyers, Arnold & Porter LLP ("Arnold & Porter"); (3) I do not have and I never have had any employment or professional relationship of any type with Claimant; (4) I do not have and never have had any professional or employment relationship of any kind with Claimant's lawyers, Bryan Cave LLP; and (5) I do not have and have never had any professional or employment relationship of any type with the Members of the Arbitral Tribunal."

902. Dr. Ibáñez Najjar only uses the present progressive form of the verb "to have" in connection with its ties to Respondent. With respect to the remaining four disclosures in that paragraph Dr. Ibáñez Najjar specifically states "that he does not have and has never had any professional or employment relationship ...."

903. It is a matter of public record that Dr. Ibáñez Najjar in 1991 was an Advisor to the *Asamblea Nacional Constituyente de Colombia*. This relationship to the Republic of Colombia is a very meaningful one that directly and expressly places in doubt Mr. Ibáñez Najjar's independence from Respondent.



904. During an approximately eleven-year timeframe (1983-1994) Dr. Ibáñez Najar was employed by *El Banco de la República*, Colombia's Central Bank. Moreover, he has served as a judge of the *Tribunal Administrativo de Cundinamarca*, as well as a *Conjuez* of the Constitutional Court.

905. Dr. Ibáñez Najar is a principal shareholder, and counsel to a company called *Instituto de Investigaciones Sociojurídicas para el Desarrollo Sostenible - Justicia y Desarrollo Sostenible LTDA*. That entity has been the recipient of at least nine commercial agreements with the Government of Colombia. Indeed, that closely held corporation has executed contracts with the Republic of Colombia since 2008. The most recent contract known to Claimant dates to 2017.

906. In 2017 Dr. Ibáñez Najar signed a contract in his personal capacity with the *Procuraduría General de la Nación*, the Republic of Colombia's equivalent to the Attorney General's Office of the United States of America.

907. Between 2000 and 2019 Dr. Ibáñez Najar served as an arbitrator in twenty-one proceedings under the auspices of the Bogotá Chamber of Commerce. In fifteen of those proceedings, agencies or instrumentalities of the Republic of Colombia served as a party. It is unclear which party appointed Dr. Ibáñez Najar.

908. Dr. Ibáñez Najar's expert report has considerable deficits that would buttress an understanding of partiality and lack of independence. Three are particularly noteworthy because of their lack of professional rigor. Claimant attributes this rigor deficit to partiality and not incompetence.

909. First, Dr. Ibáñez Najar never analyzed *at all* the extremely brief and orthodox fourteen-hour capitalization deadline that the Superintendency of Banking precipitated and of the Republic of Colombia extended to Granahorrar for purposes of tendering approximately USD 157 million to recapitalize that institution as a result of the temporary solvency crisis that the Superintendency of Banking caused Granahorrar to suffer. Any objective analysis would, at minimum, single out and identify this aberrantly short deadline (fourteen hours) that also was logistically impossible to meet.

910. Second, Dr. Ibáñez Najar did not analyze *at all* the unorthodox and legally insufficient reliance on public record notice, rather than adherence to the applicable notice methodology in connection with the formal notice of the order requiring recapitalization of the bank within a fourteen-hour timeframe. This event was unprecedented and glaring in its lack of due process. Yet, Dr. Ibáñez Najar does not reference it, let alone consider it as part of his expert report.

911. Third, Dr. Ibáñez Najar strongly emphasized that the Constitutional Court only serves a limited role in reviewing *tutela* petitions and does not act as an additional instance. Yet, the record before this Tribunal unequivocally demonstrates that the Constitutional Court in this case actually acted as a trial court and usurped the Council of State's jurisdiction.

912. Former Council State Magistrate Judge Dr. Briceño has observed that Dr. Ibáñez Najar's report claims that the Granahorrar shareholders were not at all expropriated. This conclusion is exceptionally partial because, among other things, it ignores the Council of State's November 1, 2007 Judgment<sup>439</sup> that found against FOGAFIN and the Superintendency of Banking and in favor of the Granahorrar shareholders on the ground of expropriation. That judgment did find that the Granahorrar shareholders had been expropriated. In so finding it awarded the Granahorrar shareholders COP 227 million. Although that amount does not accurately reflect the value of the loss, the more immediate proposition is that Dr. Ibáñez Najar's conclusion that the Granahorrar shareholders were not expropriated places his report in direct and express conflict with the Council of State's Judgment. It bespeaks partiality.

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<sup>439</sup> See Claimant's Exhibit C-22.

913. Moreover, Dr. Ibáñez Najjar reported that there was nothing unusual, procedurally or substantively, with the Constitutional Court's May 26, 2011 Judgment<sup>440</sup> revoking the Council of State's November 1, 2007 Judgment. This finding is suspect because, as the Tribunal is well aware, no less than two Constitutional Court judges dissented from that Judgment. In those Dissents more than just a difference of Opinion was expressed. The judges made clear that the Constitutional Court's Judgment, among other things, (i) created a stark departure from the Constitutional Court's own governing precedent on the matter, (ii) the Constitutional Court exceeded its jurisdiction because the matters to be determined concerned factual issues with respect to which the court lacked normative jurisdictional standing to adjudicate, and (iii) the Dissenting Opinions<sup>441</sup> found that the principle of "Juez Natural" had been violated, and (iv) that the Judgment also violated basic due process. A finding that the Judgment and the circumstances surrounding it were normal, orthodox, and commonplace, is an untenable proposition. It provides yet an additional factual basis from which to infer partiality and lack of independence on the part of Dr. Ibáñez Najjar.

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<sup>440</sup> See SU-447/11, Exhibit C-23.

<sup>441</sup> See AUTO 188/14, C-26.

914. Finally, for present purposes, Dr. Ibáñez Najar reports that the Constitutional Court's May 26, 2011 Judgment ended the dispute between the Granahorrar shareholders, and the Superintendency of Banking and FOGAFIN. In fact, the procedural viability and possibility of an annulment arising from alleged violations of due process is firmly established, including in Order 347/16. There is no doubt based upon clear pronouncements under the laws of the Republic of Colombia, the proceeding ended by virtue of the Constitutional Court's June 25, 2014 Order Denying the *tutela* that the President of the Council of State had perfected.

915. Having Dr. Ibáñez Najar testify in this proceeding as an independent expert witness is simply no different than having a member of the Colombian government represent to the Tribunal that he or she is an independent expert witness with no ties to the Republic of Colombia. Claimant urges this Tribunal to strike Dr. Ibáñez Najar's expert witness report or alternatively accord no weight to it.

## Conclusion

For the foregoing reasons, authority, premises, and evidence, Claimant, Astrida Benita Carrizosa, respectfully requests that this Arbitral Tribunal reject Respondent's, the Republic of Colombia, objections to jurisdiction, and proceed to a merits hearing in furtherance of the equitable administration of justice.

Dated: December 20, 2019

[signed]